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FISCAL IMPACT REPORT

ORIGINAL DATE 02/25/11
 SPONSOR HCPAC LAST UPDATED 03/10/11 HB 160/HCPACS
 SHORT TITLE Public Records Availability and Procedures SB _____
 ANALYST Wilson

REVENUE (dollars in thousands)

| Estimated Revenue | | | Recurring or Non-Rec | Fund Affected |
|-------------------|-----------|-----------|-------------------------|----------------------------|
| FY11 | FY12 | FY13 | | |
| | (\$234.0) | (\$234.0) | Recurring | TRD-MVD Operating Funds |

(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 | | NFI | | | | |

(Parenthesis () Indicate Expenditure Decreases)

Relates to SB 52

SOURCES OF INFORMATION

LFC Files

Responses Received From

Attorney General's Office (AGO)
 Commission on Public Records (CPR)
 Corrections Department (CD)
 Department of Health (DOH)
 Department of Transportation (DOT)
 Public Education Department (PED)
 Taxation & Revenue (TRD)

SUMMARY

Synopsis of Bill

The House Consumer and Public Affairs Committee substitute for House Bill 160 amends the Inspection of Public Records Act (IPRA) to require a records custodian to provide copies of public records in electronic format if specifically requested and the records are viable in

electronic format, defines “file format” and provides that exempt information in an electronic document be removed along with “corresponding metadata” by using methods or redaction tools that prevent the recovery of exempt information. The substitute bill adds provisions governing allowable charges for downloading to or providing the storage medium and for transmitting the records by mail, e-mail or fax.

FISCAL IMPLICATIONS

The substitute bill contains no appropriation. The TRD estimates a negative revenue impact (shown in the revenue table above) which assumes that a portion of current and projected royalty revenues would be lost approximately equal to the current amount of bulk data sales to those commercial data vendors that could work with slightly aged (up to 18 days as allowed by IPRA) data, by ordering all records en masse and requesting a new data dump every 15-20 days. This assumption is based on the new language in the bill which allows a records custodian to charge only the actual costs associated with downloading copies of public records to a computer disk or storage device, including the actual cost of the computer disk or storage device and to charge only the actual costs associated with transmitting copies of public records by mail, electronic mail or facsimile. Currently, TRD relies on 14-3-15.1 C. (5) NMSA 1978 C which states “The state agency that has inserted data in a database may authorize a copy to be made of a computer tape or other medium containing a computerized database of a public record for any person if the person agrees:” (among other requirements) “(5) to pay a royalty or other consideration to the state as may be agreed upon by the state agency that created the database.”

TRD recognizes that, while there is clear value to giving state agencies the ability to respond to IPRA requests in electronic formats, an unintended consequence might be a negative impact on the ability of TRD-MVD and other agencies to earn royalties from the sale of data to commercial data resellers. That concern might be alleviated, and some clarity added, by the addition of this amendment: On page 4, line 10, insert

"D. Nothing in this section regarding the provision of public data in electronic format shall limit the ability of the custodian to engage in the sale of data as authorized by the Public Records Act, Section 14-3-15.1 NMSA 1978, including but not limited to imposing reasonable restrictions on the use of the database and the payment of a royalty or other consideration."

Virtually all commenting agencies speak to the cost of providing public records, which can be substantial in terms of review for confidential material embedded in an otherwise public record and other personnel costs associated with satisfying the request whether in traditional paper or microfilm form. These concerns might be generally classified as an inability to charge for the “labor or manpower costs associated with responding to burdensome or broad IPRA requests.” The substitute bill should not increase these costs since the bill does not require furnishing the public record in electronic format unless it is already available in such a form.

SIGNIFICANT ISSUES

The CPR stated the following:

In addition to electronic records the agency generates in the course of its own operations and which could be subject to request under this bill, the agency is also the central

records repository for New Mexico state government and is charged with collecting, preserving, and making available to the public the state's permanent records. These permanent materials increasingly include electronic records that it receives from state agencies in a myriad of electronic file formats. These records present the greatest challenge in providing access.

The volume of electronic records received and maintained by the CPR is staggering. The agency has already begun to allocate staff to process the influx of electronic records that have recently been transferred. Other duties have been set aside to address the unique issues involved with storing, preserving and providing access to these electronic public records. Because hardware and software often become obsolete within two to three years, it is imperative to address the needs of these records so that the agency may meet public records requests. The substitute stipulates that a record only has to be provided in the format it exists at the time of the request addresses the conversion/migration issue.

In order to better administer the electronic records in our possession and provide access to them, the CPR needs to provide more education to the original creators. A preliminary review of the electronic records recently transferred indicates that better recordkeeping practices by the original custodians and their designated records liaison officers are required. Additional staff, knowledgeable in electronic records management, may be required to educate the records creators. As the volume of electronic records increases exponentially, additional staff may be required also just to process and manage requests for electronic records.

RELATIONSHIP

Sections 1 and 3 of this substitute duplicate SB52/SPACS.

OTHER SUBSTANTATIVE ISSUES

The CPR disagrees with the fiscal implications and provided the following:

While the new language in Section 3 of the substitute limiting provision to records already in electronic format and to the current file format in which the record exists, eliminate the costs associated with conversion, there are costs to providing electronic copies. Those costs, however, will vary depending on file format and delivery method and whether the record contains exempt information that must be redacted. While the bill permits the recovery of actual costs of downloading and transmitting electronic copies, the supplies necessary will need to be purchased in advance. Redaction software will also be required. While redaction software for the more common file formats (PDF, Word, etc.) is relatively inexpensive (\$200 or less), upgrades will be required as software changes. The costs of redacting exempt information in less common file formats and databases may well be more. These costs will likely be incurred by any agency providing electronic copies.

The CPR will likely be faced with additional costs because it houses the state archives that contain the permanent records of the State, of which an increasing number are electronic. Providing electronic access to this deluge of electronic records is not without cost. There is the cost, for example, to arrange and describe these records to make them accessible. Additional considerations include adequate storage and migration as well as the costs associated with upgrading existing hardware and software applications to

manage effectively not simply the volume of records but the variety of electronic file formats and databases that have been and will be transferred. These are records that the SRCA did not create and therefore may not have the hardware and software, including licenses, essential to the process. Delivery costs would include purchasing additional supplies such as CDs, DVDs and USB drives – a cost that other agencies would likely also incur to a degree. Each request would require one or more of these delivery media, depending on the size of the electronic files. Delivery via e-mail is not always an option based on the file size and file type of the requested record. Drives to write these records to the delivery medium would be necessary. The agency would be required to purchase software licenses to provide access to the varied propriety file formats that come in. Specialized staff, knowledgeable in both archival science and information technology, could be needed. Since the permanent records held in the Archives are open to the public absent a confidentiality/exempt provision, the Commission would eventually likely need to make these expenditures; however, this bill and others like it will advance the expenditures.

Perhaps the greatest potential costs are those that could derive from litigation should an agency not be able to produce the electronic copy or is not careful and thorough in any redactions. Failure to provide an electronic access in a timely manner or failure to maintain confidentiality could result in litigation, which could have significant fiscal implications. A preliminary review of the electronic records recently transferred to the state archives indicates that better recordkeeping practices by the original custodians and their designated records liaison officers are required. Failure to manage electronic records in accord with records retention and disposition schedules and to understand the issues of authenticity and reliability associated with such records can have potentially costly ramifications.

Another potential risk is the possibility of fraudulent documents when a requestor asks for and receives an electronic copy in a format that can be altered. Depending on the nature of the record, the transmitting agency may need to embed water marks or otherwise certify the copy. This can add time and expense.