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## FISCAL IMPACT REPORT

ORIGINAL DATE 03/02/11  
 SPONSOR Cervantes LAST UPDATED 03/03/11 HB 406  
 SHORT TITLE Inspection of Electronic Records SB \_\_\_\_\_  
 ANALYST Aubel

### REVENUE (dollars in millions)\*

Estimated Revenue			Recurring or Non-Rec	Fund Affected
	FY12	FY13		
Royalties	(\$6.2)	(\$6.2)	Recurring	TRD-MVD

(Parenthesis ( ) Indicate Revenue Decreases)

\*See fiscal impact.

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)\*

	FY11	FY12	FY13	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
<b>Total</b>		Indeterminate	Indeterminate	Indeterminate	Recurring	All funding sources

(Parenthesis ( ) Indicate Expenditure Decreases)

Conflicts with SB 52 and HB 160  
 Relates to SB 128 and SB 271

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

- Commission of Public Records (CPR)
- Taxation and Revenue Department (TRD)
- New Mexico Corrections Department (NMCD)
- New Mexico Department of Transportation (NMDOT)
- Public Education Department (PED)
- Department of Health (DOH)
- Educational Retirement Board (ERB)
- Attorney General's Office (AG)
- Public Education Department (PED)

## SUMMARY

### Synopsis of Bill

House Bill 406 repeals Section 14-3-15.1 of the Public Records Act and replaces the section with new material. CPR provides a summary of changes, as follows:

Repeal. The bill repeals Section 14-3-15.1 NMSA 1978 and in doing so: removes current provisions providing for procedures, schedules and technical standards for the retention of databases; eliminates restrictions on the use of databases or information in databases; eliminates the provision permitting royalties or other considerations; and does away the penalty for unauthorized use.

New Subsection A provides for the disclosure of information contained in a database maintained by or on behalf of a public body unless the information is prohibited by federal or state law from disclosure. The information is to be provided in the format requested and in the most effective and efficient manner available to the custodian, as defined in the Inspection of Public Records Act.

New Subsection B authorizes the custodian to charge a reasonable fee for the production of the information requested but limits the fee to the cost of materials reasonable charges for personnel required to retrieve and provide the information.

New Subsection C authorizes the custodian to enter into a contractual agreement with the requester to provide access to the database via remote electronic access and allows the custodian to establish a fee for the access.

The effective date is July 1, 2011.

## FISCAL IMPLICATIONS

The primary fiscal impact noted by agencies concerns the elimination of the ability for agencies to have any royalty arrangements for providing electronic data, and allowing the agencies to only charge sufficient fee to cover the cost of materials and reasonable charges for personnel required to retrieve and provide the information. For remote electronic access, the custodian could charge a fee for the access that may include the costs of providing such access.

TRD provides a specific example of this concern:

The revenue impact would be a direct hit against the funding stream for TRD-MVD's "Milagro" driver and vehicle systems reengineering project and other "DRIVE MVD" initiatives, and would put those projects in jeopardy.

TRD responded that the royalty received from the delivery of driver and vehicle data to commercial data vendors and other users totals about \$6.3 million, which is based on actual revenue receipts for the following revenue streams:

- Driver History Revenue
- Driver Monitoring Revenue
- Motor Vehicle Records

- Youthful Driver Monitoring
- Bulk Data.

Estimated Revenue Impact*						R or NR**	Fund(s) Affected
FY2011	FY2012	FY2013	FY2014	FY2015	FY 11-15		
(0)	(6,216)	(6,216)	(6,216)	(6,216)	(24,864)	R	TRD-MVD operating funds

Source: TRD

According to TRD the revenue stream would be impacted by the elimination of the royalty associated with the bill, as follows:

The provision in current Sec. 14-3-15.1 (which would be repealed by HB-406) for payment of a royalty to the agency that created the database is the basis for TRD-MVD’s current system of delivery of driver and vehicle data to commercial data vendors and other users through New Mexico Interactive (NMI). The revenues from those data sales make up the primary funding source for TRD-MVD’s “Milagro” driver and vehicle systems reengineering project and other “DRIVE MVD” initiatives. Repeal of that section, and its replacement with a new section requiring that the same data be provided at cost would, in the absence of replacement funding sources, require the termination of those critical projects.

CPR also speaks to this concern:

While the bill does provide for assessing a reasonable fee for the production of information requested and allows for an access fee for electronic access, it does not provide for the royalties allowed under current law. The Commission does not presently have any royalty agreements, but other agencies likely do. The bill would prevent the Commission or other agencies from collecting future royalties and presumably terminate those currently collected. The bill could possibly reduce some revenues the Commission now can charge under other statute.

The number of agencies and local governments that have royalty arrangements is not known, but the fiscal impact by eliminating these arrangements and replacing them with a fee based on actual costs could be significant to the respective agencies, as evidenced by TRD.

The second primary concern raised by the responding agencies regarding the fiscal impact of the bill is the uncertainty of costs and effort to convert databases to a readable format for the requester or to provide remote access to the database. While the bill does allow agencies to charge a “reasonable” fee, the issue becomes how complex and expensive compliance with the law might become. Due to the uncertainty of technical requirements and the uncertainty of terms such as “reasonable”, it is conceivable that complying with the bill’s requirements might be cost-prohibitive to both the requestor and the public body. Increases to operating budgets for completing contracts, purchasing equipment and allocating personnel appear probable but indeterminate due these uncertainties. The agencies commented on this issue as follows:

DOH: HB406 may not recognize the extent to which electronic records exist in many different formats and the work entailed in converting the records to a readable format in order to be understood by the requestor... The Department may also require hardware

and/or software to provide the public record in the format requested or depending on the definition of remote electronic access.

ERB: As more and more ERB agency records are stored electronically, there is an increased cost to retrieve and to provide such electronic records requests. This comes into play with the substantial time it takes to electronically redact confidential material embedded in public records that are otherwise legally obtainable. This could require agencies to purchase special electronic tools to redact the information and as software is constantly being upgraded, may be required to continually purchase upgrades of such tools. Some of these costs can be offset by an agency's ability to charge the requestor reasonable personnel costs to provide the records.

PED: While referencing the Inspection of Public Records Act in regards to the definitions of "public body" and "custodian," HB 406 does not make it clear whether all the time limits, restrictions, penalties and other requirements of the IPRA will apply to access to agency databases. If the time limits and restrictions of IPRA apply, agencies will have to produce databases within 15 days of receiving a request for inspection. This would not allow for enough time for agencies to enter into a contractual agreement for electronic access and fees for such access as anticipated in this bill.

TRD: This bill could be interpreted to require a public body to convert a record held in a particular format into one in another format of the requestor's choice, thereby creating a new record contrary to other IPRA provisions. If a public body is required to convert a record held in a particular format into one in another format of the requestor's choice, the cost of personnel to conduct such a conversion could be very high and could jeopardize other areas of an agency's functionality by taking resources that could be better utilized in other ways.

CPR: Databases are typically stored in proprietary formats associated with the computer programs that create and process the data. Microsoft Access stores data in its native format, Oracle stores data in its native format, and so on. Customized programming may be necessary to import and copy databases stored in proprietary formats into a format requested by a member of the public. Proprietary databases also require the purchase of licenses to run the applications that retrieve and manipulate the raw data stored in a database. There are undetermined fiscal implications associated with providing information from a database in an electronic format. They include costs for customized programming, licensure, and storage devices for delivery the information requested. State databases such as SHARE, OnGuard or the MVD Drivers System contain an enormous amount of data and would require external hard disks to provide the information.

NMDOT: Fiscal implications are indeterminate. Of issue would be the unforeseen cost associated with seeking to enforce contractual agreements regarding remote electronic access, as well as the institutional cost associated with establishing adequate security measures to provide the public with remote access.

## **SIGNIFICANT ISSUES**

PED notes that HB 406 will lead to greater transparency in the workings of state government.

Agency responses indicated five areas that appear to be unclear or indicate potential unintended consequences:

1. Whether the bill would undo the holding in *Crutchfield v. New Mexico Department of Taxation and Revenue*, in which the state court of appeals found that the state Public Records Act (PRA) intended to permit state agencies to limit public use of agency databases, thereby creating an exception to the general public policy of transparency underlying the Inspection of Public Records Act (IPRA). HB 406 makes it clear those information systems databases shall be subject to disclosure to any person requesting the information in the databases.
2. Whether there is a contradiction regarding the format of databases to be produced. PED discusses this issue: “Page 1, lines 20-25 indicated that databases shall be subject to disclosure to a person requesting the information “in the format requested.” However, the next sentence indicates that “[t]he information shall be provided in the most effective and efficient manner available to the custodian...” HB 406 should make clear whether databases shall be provided in the format requested or in the format that is effective and efficient for the custodian.”
3. Whether the bill would conflict with Section 14-3-18 of the Public Records Act, which governs public access to county and municipality computer databases and has different, albeit similar, requirements.
4. Whether the bill could compromise confidential information.
5. Whether the bill, by repealing the current statutory provisions in Section 14-3-15.1 NMSA 1978, leaves the following gaps as defined by ERB:
  - That the administrator recommends to the commission procedures, schedules and technical standards for the retention of data bases;
  - Safeguards to the agencies who provide electronic records, such as requiring the requestor of the electronic records to agree not to make unauthorized copies of the database; not to use the database for political or commercial purposes unless agreed on by the agency; not to use the database for solicitation or advertisement purposes by using personal information obtained; not to allow the database to be used by unauthorized persons; and to require the requestor to pay a royalty to the state if such an arrangement is agreed upon;
  - Provisions regarding the sharing of databases between state agencies; and
  - Penalties for revealing information to unauthorized persons.

## **PERFORMANCE IMPLICATIONS**

DOH provides a summary of performance implications that would apply to all public bodies under the bill:

HB406 relates to the Department of Health’s FY12 Strategic Plan Goal 3: Improving the Health System, System Objective 1: Improve accountability and responsiveness of our services within the Department of Health.

## **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

HB406 conflicts with:

HB 160, which would amend the Inspection of Public Records Act at 14-2-8 by adding new

material to require public bodies to display the procedure for requesting records and the contact information for the agency custodian on a publicly accessible website.

SB 52, which would amend the Inspection of Public Records Act to mandate that a public body make public records available in an electronic format if specifically requested to do so and if the requested record is available in such format.

HB 406 relates to two bills:

SB 128, which adds new subsections to IPRA that relate specifically to certifying public records as true and correct copies among other requirements.

SB 271, which increases penalties for non-compliance with IPRA.

## **TECHNICAL ISSUES**

The AG discusses other technical issues that could be clarified:

Although HB 406 includes references to the Inspection of Public Records Act, it is not clear that a public body that receives a request for information in a public body's information systems database is supposed to handle the request in accordance with the Inspection of Public Records Act. An argument might be made that HB 406 creates a separate process for requests for electronic information.

Subsection (C) applies to information "requested to be provided via remote electronic access," which requires the custodian to enter into a "contractual arrangement" with the requester to govern access and establish a fee for the access. It is unclear what constitutes information "provided via remote electronic access" or what distinguishes it from other types of access to electronic data, including access via a public body's website.

## **OTHER SUBSTANTIVE ISSUES**

ERB gives a detailed example of the technical difficulties that might be involved:

A significant issue would also be how to turn over the database. For example ERB's mission critical database is an Oracle database. If ERB was forced to turn over the database the recipient would be required to have a server with adequate space for the database (now approximately 100 GB), an Oracle license (approximately \$40,000), as well as the front end application that would be required to view the information in a usable manner. Without the infrastructure to handle the database the recipient would be viewing raw data that may not be of use to them.

## **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

Agencies will provide electronic files under existing statute.

MA/mew:bym