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FISCAL IMPACT REPORT

01/20/11

ORIGINAL DATE 03/10/11

SPONSOR Fischmann **LAST UPDATED** 03/11/11 **HB** _____

SHORT TITLE Electronic Copies Of Public Records **SB** 52

ANALYST Haug

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	NFI	NFI			

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Attorney General (AGO)
 Administrative Office of the Courts (AOC)
 Public Employees Retirement Association (PERA)
 State Investment Council (SIC)
 Public Education Department (PED)
 Department of Health (DOH)
 Corrections Department (NMCD)
 State Commission of Public Records (CPR)
 General Services Department (GSD)
 State Treasurer (STO)

SUMMARY

Synopsis of HCPAC Amendments

The House Consumer and Public Affairs Committee Amendments to Senate Public Affairs

Committee Substitute for Senate Bill 52 make minor editorial changes and inserts the following language:

“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 Section 14-3-15.1 NMSA 1978, including imposing reasonable restrictions on the use of the data base and the payment of royalty other consideration.””,

Synopsis of Original Bill

Senate Bill 52 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 available in electronic format. Senate Bill 52 adds provisions governing allowable fees for providing copies of records in electronic format and allows the custodian to charge a reasonable fee for creating, converting or compiling a record that did not previously exist should the custodian agree to create, convert or compile a non electronic form record in electronic form.

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.” Senate Bill 52 however 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 AGO states Senate Bill 52 has three provisions that may foster a legal challenge:

(1) The bill adds a subsection (C) to Section 14-2-9 that requires a records custodian to transmit a copy of a public record by e-mail “if the custodian can reasonably and efficiently produce and transmit the copy with available personnel and with existing and available software and hardware.” This may lead to disputes about a public body’s compliance with IPRA where a public body and requester disagree about whether the custodian can “reasonably and efficiently produce and transmit” the record by e-mail and about the sufficiency of the public body’s existing and available personnel and other resources.

(2) The bill adds a subsection (E) to Section 14-2-9 providing that a public body is not required to respond to a request for copies of a public record by creating or compiling a record that does not exist. This is arguably covered by an existing provision of IPRA, which provides that “nothing” in IPRA “shall be construed to require a public body to create a public record.” § 14-2-8(B). In contrast to the proposed amendment, the existing provision is not limited to a request to copy a public record. The discrepancies or perceived discrepancies between the two provisions may cause confusion about an agency’s responsibility to create or not create a record under IPRA.

(3) Proposed subsection (E) also permits a custodian to charge a reasonable fee if the custodian agrees to create or compile a record or convert it to electronic format. This will cause confusion and disputes between records custodians and requesters because it is not clear whether it will be permissible for a custodian to charge a fee for creating, compiling or converting a record for purposes of inspection or if the fee may be charged only if the record is created, compiled or converted in response to a request for copies. Disputes also are likely because records custodians and requesters may disagree about whether a public body properly created, compiled or converted a particular record and whether the fee charged by a public body reflected the “actual costs” of creating, compiling or converting a record. See also comments below under “Amendments Needed.”

The AOC notes that currently there is no express authorization to respond to a request for public records by providing an electronic form of the records requested although many public entities routinely use electronic format to respond to public records requests. SB 52 would clarify the legal authorization to do so for public entities that may be hesitant to provide electronic format documents because of uncertainty about the law.

According to the CPR:

One of the significant issues within Senate Bill 52 is the use of the term “electronic format,” which may be interpreted in a variety of ways. Electronic format, for example, can refer to the method of delivery, such as on CD, DVD, or external hard drive, or to the way an

individual file is organized and encoded for storage. Some of the more common file formats/types include the items listed below; however, there are hundreds of electronic file formats that are used for different types of data.

- Word documents (.doc)
- Web text pages (.htm or .html)
- Adobe Acrobat files (.pdf)
- Image files (.tiff or .jpg)
- Personal Storage Tables (.pst)

Some of the litigation taking place around the country relates specifically to the file format. Individuals are making public records requests and specifying in what file format the electronic record should be delivered. Controversy occurs when the agency is unable to provide the requested file format. Custodians assert that they can provide only the electronic formats routinely created and maintained by their agencies in the course of regular business. This stands to reason, as they are restricted by the hardware and software applications that create the records.

Unfortunately, providing public records in their native electronic format may prove useless to requesters if they have no way to convert the electronic file into readable information. Again, this is because electronic records are hardware and software dependent, and these two elements are often proprietary. Providing a personal storage table (pst), for example, to someone who lacks Microsoft Outlook does not satisfactorily provide access to the information contained within. In this instance, is it the responsibility of the custodian to convert the electronic record into some other readable format? Who bears the cost of this conversion? In another example, providing a Word 2003 document to a requester who has Word 2007 or vice-versa may also prove problematic. Conversion from one software version to another may alter documents in unexpected ways. This raises concern over the authenticity and reliability of the record. Is it the responsibility of the custodian to convert the electronic record and validate the authenticity of the information in its new electronic format or simply provide the electronic record in its native format? Who bears this cost?

Providing access to information within databases is even more complicated. Databases are a collection of individual data elements that are organized and searchable via specific software applications. Without the database application to search, sort and collate, the requester may be left with only a table or tables of raw data. The variety of database models (flat, hierarchical, relational, object-oriented, etc.) also complicates how one would provide access to this type of record if requested.

TECHNICAL ISSUES

According to the AGO, SB 52 has three provisions that may foster a legal challenge:

- (1) The bill adds a subsection (C) to Section 14-2-9 that requires a records custodian to transmit a copy of a public record by e-mail “if the custodian can reasonably and efficiently produce and transmit the copy with available personnel and with existing and available software and hardware.” This may lead to disputes about a public body’s compliance with IPRA where a public body and requester disagree about whether the custodian can “reasonably and efficiently produce and transmit” the record by e-mail and

about the sufficiency of the public body's existing and available personnel and other resources.

(2) The bill adds a subsection (E) to Section 14-2-9 providing that a public body is not required to respond to a request for copies of a public record by creating or compiling a record that does not exist. This is arguably covered by an existing provision of IPRA, which provides that "nothing" in IPRA "shall be construed to require a public body to create a public record." § 14-2-8(B). In contrast to the proposed amendment, the existing provision is not limited to a request to copy a public record. The discrepancies or perceived discrepancies between the two provisions may cause confusion about an agency's responsibility to create or not create a record under IPRA.

(3) Proposed subsection (E) also permits a custodian to charge a reasonable fee if the custodian agrees to create or compile a record or convert it to electronic format. This will cause confusion and disputes between records custodians and requesters because it is not clear whether it will be permissible for a custodian to charge a fee for creating, compiling or converting a record for purposes of inspection or if the fee may be charged only if the record is created, compiled or converted in response to a request for copies. Disputes also are likely because records custodians and requesters may disagree about whether a public body properly created, compiled or converted a particular record and whether the fee charged by a public body reflected the "actual costs" of creating, compiling or converting a record. See also comments below under "Amendments Needed."

The AGO also suggests deleting proposed Section 14-2-9(E) for the following reason:

Currently, a public body has no obligation to create, compile or convert a record in response to a request to inspect or copy the record. Even so, a public body may decide to create, compile or convert a record if the public body determines that it is easier or more convenient for the public body. Permitting an agency to charge a fee for creating, compiling or converting a record will add an unnecessary obstacle to requests to inspect or copy public records. It will inevitably lead to disputes about whether it was really necessary for an agency to create, compile or convert a record in order to make it available and whether the fee charged reflected the "actual cost" to the agency of creating, compiling or converting the record.

The CPR suggests:

To avoid possible problems with varying electronic formats discussed above, additional language should perhaps be included in Subsection E that would stipulate that custodians are not required to furnish electronic records in any other electronic format other than those formats routinely created and maintained by the agency. It may want to further clarify that custodians may agree to convert one electronic format to another but may charge a reasonable fee not to exceed the actual cost of converting the files.

OTHER SUBSTANTIVE ISSUES

The AGO notes that proposed Section 14-2-9(C) requires a public body to deliver copies of public records in electronic format by e-mail if specifically requested. It is not clear whether a public body would comply with this requirement if a public record was available to a requester

for inspecting, downloading or copying from the public body's website.

GH/mew:svb