



reflect the purpose of the amendment to the Act.

Synopsis of SPAC Amendment

The Senate Public Affairs Committee Amendment strikes the felony penalty for destroying a public record in order to circumvent a request under IPRA.

Synopsis of Original Bill

Senate Bill 271 creates a new section in the Inspection of Public Records Act (IPRA) that would (1) make it a misdemeanor punishable by a fine of up to \$500 to knowingly and in bad faith withhold public records subject to inspection; and (2) makes it a fourth degree felony punishable by a fine of up to \$5,000 and 18 months imprisonment to knowingly and willfully destroy a public record in order to circumvent a request under IPRA.

**FISCAL IMPLICATIONS**

\*Because SB 271 criminalizes certain actions, there is a potential that prosecutions for violation of the statute will be filed in magistrate, metropolitan and district courts. AOC maintains that it is unclear how many cases may be filed or how complicated they may be, so the fiscal implication of the bill remains uncertain.

It is unknown if public employees will be entitled to a defense under the Risk Management Division because their acts would constitute criminal and not civil or tort law violations.

**SIGNIFICANT ISSUES**

The bill is intended to enforce proper compliance by those charged with processing IPRA requests by criminalizing willful misconduct related to those requests.

IPRA currently includes an enforcement clause that authorizes courts to order disclosure of public records and awards damages of \$100 plus attorney fees for failure to provide such records. SB 271 criminalizes willful failure to disclose public records upon request. Specifically, a knowing and bad faith withholding of records is made a simple misdemeanor, and a knowing and willful destruction of records with intent to avoid valid disclosure is made a fourth degree felony.

**PERFORMANCE IMPLICATIONS**

AOC states the bill establishes a relatively high burden of proof of specific intent. Public servants who respond to public records request reasonably, and who withhold public records only upon a fair argument that they are not subject to disclosure, will not be acting in the manner specified for criminal responsibility in the bill. This bill only criminalizes the actions of a public servant who knows they should be disclosing certain documents, does not have a reasonable position for withholding them, but still either fails to disclose them or destroys them.

NMCD notes that criminalizing this behavior is likely to chill if not completely stop public employees from relying on the twelve statutory exceptions or exemptions listed in IPRA. Rather than risk fines and misdemeanor convictions, a significant number of public employees are likely to simply turn over all requested documents.

NMPD comments that to comply with the Due Process Clause of the Fourteenth Amendment, a penal statute must give fair notice to ordinary people of what conduct is prohibited in a manner that does not encourage arbitrary and discriminatory law enforcement.

### **ADMINISTRATIVE IMPLICATIONS**

Public entities will need to train employees of the consequences of their actions relative to the handling of public records. PED notes that state agencies, particularly records custodians, may need to obtain legal advice each time they determined that a requested record should be withheld. This could lengthen the time needed to respond to requests under the IPRA.

### **TECHNICAL ISSUES**

Language could be added that would make clearer that the bill refers only to records that are already being kept in accordance with the agency's retention policy.

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

Criminal penalties will not be added to the IPRA. Remedies for violating the IPRA will continue to be limited to the civil remedies currently available.

AHO/bym