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FISCAL IMPACT REPORT

SPONSOR HJC ORIGINAL DATE 02/24/21
LAST UPDATED 03/03/21 HB 124/aHSEIC/HJCS
SHORT TITLE State Agency Sensitive Info SB _____
ANALYST Gaussoin/Courtney

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY21	FY22	FY23	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		See Fiscal Implications				

(Parenthesis () Indicate Expenditure Decreases)

Similar to Senate Bill 75 and Senate Bill 327.

SOURCES OF INFORMATION

LFC Files

Responses Received From

Office of the Attorney General (NMAG)
Superintendent of Insurance (OSI) on the original bill
State Personnel Office (SPO)
State Ethics Commission (SEC)
Administrative Office of the Courts (AOC)
Department of Health (DOH)

SUMMARY

Synopsis of Bill

The House Judiciary Committee substitute for House Bill 124 prohibits disclosure of sensitive personal information by state employees prescribing penalties and providing exceptions for disclosure.

The bill enacts the Nondisclosure of Sensitive Personal Information Act.

It would allow for the release of the information under nine exceptions, including when necessary to carry out the function of a state agency, to comply with a court order or subpoena, when required by federal statute or the Inspection of Public Records Act (IPRA), when required by federal statute, made to or by a court in the course of a judicial proceeding, made to a state contractor to perform contract obligations, made pursuant to the Whistleblower Protection Act,

when permitted by the federal Health Insurance Portability and Accountability Act of 1996, or made with written consent of the person whose information would be disclosed.

The bill identifies sensitive personal information as identifying a status of a recipient of public assistance or as a crime victim, sexual orientation, gender identity, physical or mental disability, medical condition, immigration status, national origin or religion along with information including the social security number or tax identification number of an individual.

The bill defines penalties for violations of the act including dismissal, demotion, or suspension. It further empowers the attorney general, a district attorney and the state ethics commission to institute civil action which could result in a temporary injunction, a restraining order or civil penalties of \$250 dollars per violation not to exceed \$5,000 dollars. The bill also makes knowing and willful violation of the Nondisclosure of Sensitive Personal Information Act a misdemeanor punishable by fine of not more than \$1,000 dollars, or by imprisonment for not more than one year, or both.

The law would become effective July 1, 2021.

FISCAL IMPLICATIONS

The bill could result in additional workload for agencies enforcing provisions of the act. The bill could also result in a need for additional training on the act, particularly for those state employees handling sensitive data on a regular basis. The bill does not include an appropriation.

SIGNIFICANT ISSUES

Potential issues of duplication of existing law. The State Personnel Office notes that some of the provisions of the Act “overlap with existing laws and regulations”. Numerous existing state laws (NMSA 7-1-8; NMSA 10-16-3(A); NMSA 10-16-6; NMSA 14-3A; NMSA 43-1-19) and federal laws (Health Insurance Portability and Accountability Act (HIPPA), the Americans with Disability Act, and the Family Educational Rights and Privacy Act) provide protections to certain categories of data deemed confidential by law. Some of the proposed data protections proposed in House Judiciary Committee Substitute for House Bill 124, for data categorized by the bill as sensitive, reflect protections already in place in existing state and federal statute (for example social security numbers are deemed confidential by the United States Social Security Act and protected from disclosure in state law such as IPRA). NMAG states that the bill “would render IPRA’s protection of both individual taxpayer identification numbers and social security numbers somewhat redundant.

Potential issues with the Inspection of Public Records Act. The Office of Attorney General (NMAG) indicates the provision in HB124 permitting disclosure of sensitive personal information when required by IPRA would create ambiguity because IPRA requires disclosure except as otherwise provided by law. “Read literally this exception would effectively negate the overall confidentiality conferred by the bill in the context of a request for records pursuant to IPRA” the agency says.

Potential issues with data sharing among agencies. Although the bill lists an exception of disclosing data as allowed by HIPPA under exceptions, and notes disclosure as required by federal statute as a exceptions, there are other federal laws that allow for disclosure of personally identifiable information that are not addressed in the bill. For example, the Federal Educational Rights and Privacy Act (FERPA) includes exceptions that allow protected data to be shared under certain conditions with agencies, vendors or individuals, or to conduct studies, audit or evaluate programs, or in the case of responding to health or safety emergencies. Since these are allowances under FERPA and not requirements, it is unclear if the provisions of House Judiciary Committee substitute for House Bill 124 could limit the sharing of “sensitive personal information” unless it meets another exception of the act (e.g. a state agency determines the sharing of such data is necessary to carry out a function of the state agency). Although it is unlikely data should be shared if not determined to be necessary to carry out a function of a state agency, data sharing among agencies would likely be based on that interpretation. Note that previous LFC staff reports have cited existing difficulties in data-sharing among state and local agencies noting agencies are sometimes reluctant to share data with one another citing concerns with standing state and federal law.

Along these lines the State Ethics Commission state the following “The Joint Powers Agreement Act, §§ 11-1-1 to -7 (1961, as amended 2009), allows state agencies to enter agreements with other agencies and instrumentalities of the federal government, other state and tribal governments, and political subdivisions. Where state agencies enter into data-sharing agreements with other federal, state, local or tribal government entities, data-sharing conduct under such agreements might be conduct “necessary to carry out a function of the state agency.” House Bill 124, § 1(A)(1). Accordingly, it is not clear that, as currently drafted, the bill would ultimately and significantly constrain the sharing of “sensitive personal information” between state agencies and other governmental entities where the governmental entities have entered data-sharing agreements.”

Along these lines, AOC also provided a concern regarding potential impact of the act on existing data sharing among criminal justice agencies their NM dataXchange network suggesting an amendment for an exception.

OTHER SUBSTANTIVE ISSUES

OAG indicates that the act would only apply to state agencies and not employees of local government agencies.

The State Personnel Office points out that state employees could be disciplined, including dismissal, for inadvertent disclosure of sensitive personal information.

PERFORMANCE IMPLICATIONS

The courts are participating in performance-based budgeting. It is unknown if enactment of this bill would impact performance measures as they relate to judicial budgeting.

RELATIONSHIP

Similar to Senate Bill 75 and Senate Bill 327 differing in exceptions to sharing and in penalties.

OTHER SUBSTANTIVE ISSUES

The State Ethics Commission points out that they have promulgated rules that include a similar non-disclosure provision in the Commission’s model code of ethics for state agencies although it is up to state agencies to adopt the provisions of the model code.

ALTERNATIVES

From AOC:

“To ensure the proposed disclosure restrictions do not impact access to data through electronic court databases and the newly established NM dataXchange network, the legislation’s exception (5) could be amended to read, “made to or by a court in the course of a judicial proceeding or made in a court record *or electronic database of court record information.*””

From OAG:

“The OAG recommends amending proposed Section 2 (A)(3) to read: “pursuant to a request for public records under the Inspection of Public Records Act” to make clear that this information can be produced under IPRA.”

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