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FISCAL IMPACT REPORT

LAST UPDATED _____
ORIGINAL DATE 2/19/23

SPONSOR Sedillo Lopez

BILL

SHORT TITLE In-Custody Death Investigation Procedures **NUMBER** Senate Bill 265

ANALYST Daly

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY23	FY24	FY25	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
DPS	No fiscal impact	\$1,700.1 to \$6,800.1	\$1,163.2 to \$4,536.1	\$2,763.3 to \$11,336.2	Recurring	General Fund
NMAG Investigations	No fiscal impact	\$450.7	\$450.7	\$901.4	Recurring	General Fund
NMAG Prosecutions	No fiscal impact	up to \$313.5	up to \$313.5	up to \$627.0	Recurring	General Fund
District Attorneys and Other State Agencies	See Fiscal Implications				Recurring	General Fund
Local Law Enforcement Agencies	No fiscal impact	up to \$5,100.3	up to \$3,372.9	up to \$8,473.2	Recurring	County Operating Funds

(Parenthesis () Indicate Expenditure Decreases)

*Amounts reflect most recent version of this legislation.

Relates to/May Conflict with SB 252

Sources of Information

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
 Administrative Office of the District Attorneys (AODA)
 Office of Attorney General (NMAG)
 Sentencing Commission (NMSC)
 Department of Public Safety (DPS)
 Corrections Department (NMCD)

SUMMARY

Synopsis of Senate Bill 265

SB265 establishes procedures for reporting, investigating and prosecuting an incident in which a peace officer's use of force against a person in the course of the officer's duties results in great

bodily harm or death or in the event of any other in-custody death. “Great bodily harm” means an injury to the person that creates a high probability of death, causes serious disfigurement, or results in permanent or protracted loss or impairment of a bodily function, member, limb, or organ. “In-custody death” is defined as a death that occurs while an individual is being detained under color of law.

Upon such an event, the sheriff or chief of police within whose district the incident occurred must report the incident to the jurisdictional district attorney within 24 hours of the incident, who in turn must report it to the attorney general and the governor within 24 hours of being notified. The governor is required to maintain a log of such reports, containing details as specified in Subsection C, which log is a public record subject to the Inspection of Public Records Act (IPRA).

The relevant prosecuting authority shall represent the state at a probable cause hearing at which it shall present evidence of the peace officer’s use of force and evidence of criminal offenses committed by the officer, including but not limited to first and second degree murder, voluntary and involuntary manslaughter, aggravated assault, assault with intent to commit a violent felony, and aggravated battery.

DPS is the default primary agency charged with investigating as soon as practicable instances of in-custody death and instances of a person suffering great bodily harm or death after a peace officers used force on that person. DPS may request assistance from other agencies as part of a task force agreement but remains the primary agency. The agency involved in the use of force may assist in the investigation but may not have any type of lead role in the investigation, unless the agency involved in the use of force is DPS, in which case at least two agents from NMAG or another competent investigative agency must work in conjunction with DPS, which remains the lead investigative agency.

During an investigation, Section I requires the prosecuting authority shall provide quarterly reports, which are subject to IPRA. Any declination to prosecute must be documented in a detailed report provided to the attorney general, the relevant district attorney, and the governor, and are considered public record and subject to IPRA. If a district attorney declines to prosecute, the bill specifies that the attorney general has jurisdiction to prosecute unlawful uses of force and in-custody deaths, and to prosecute any unlawful use of force involved in a failure to comply with the requirements for electronic recordings of custodial interrogations (pursuant to Section 29-1-16 NMSA 1978) or a failure to record the incident by using a body-worn camera approved by DPS.

The bill requires any costs incurred by DPS in investigating an incident be reimbursed by the public entity that employs the peace officer under investigation or the public entity in whose custody the in-custody death occurred. Any costs incurred by NMAG in conducting the prosecution shall be reimbursed by the district attorney’s office in the judicial district in which the conduct is alleged to have occurred.

This bill does not contain an effective date and, as a result, would go into effect June 16, 2023, (90 days after the Legislature adjourns) if signed into law.

FISCAL IMPLICATIONS

Investigation Costs. As the “default primary investigative agency”, DPS/ New Mexico State Police (NMSP) reports it would need to create a new Use of Force Unit in the Investigations Bureau to carry out the provisions of the legislation. According to DPS, the Unit needs one Lieutenant to oversee the Unit, two sergeants and 10 agents to create two sections housed in Albuquerque and Las Cruces to respond to, and conduct investigations, one sergeant and six agents in a Crime Scene Team to respond to locations to collect evidence, and three civilian positions (two Data Analysts and one Business Operations Specialist) to collect, analyze, and disseminate data to stakeholders and process paperwork for the new Unit. The total estimated cost to staff the new Unit with 23 positions is \$6,800,100 in FY24 including the initial purchase of investigative equipment, network server, vehicles, and furniture. The recurring cost will be \$4,536,100 in FY25 and future years.

DPS provides this breakdown of its FY 24 estimate:

Description of Request	Total Request
Investigation Unit 2 Supervisors; 10 Investigators	\$1,189.5
Crime Scene Unit 1 Supervisor; 6 Investigators	\$695.1
1 Supervisor - 2 Units	\$143.5
Unit Support Staff 2 Data Analysts; 1 Business Operations Specialist A	\$244.5
Additional Manhours not currently provided by NMSP	\$1,830.4
Other Cost (Vehicles, Uniforms, IT Equipment, Training, Travel, Fuel, etc.)	\$2,697.1
Total	\$6,800.1

The entirety of this \$6.8 million estimated cost increase could be incurred by DPS in FY24 and an estimated recurring \$4.5 million in future fiscal years in the event the agency is not reimbursed for any of its costs related to investigations. However, assuming some cost sharing, the additional operating budget impact to DPS could be significantly lower, but would likely not be reduced to zero. These cost estimates rely on the following assumptions:

- LEAs reimburse DPS for all investigation costs and additional hours for great-bodily-harm investigations;
- The remaining staffing costs (supervisors and crime scene technicians) would be split, with LEAs covering 75 percent of costs and DPS paying 25 percent for times when those personnel were not directly working on a reimbursable investigation; and
- DPS is responsible for all training costs.

This would result in an average annual cost increase to LEAs of \$5.1 million and to DPS of \$1.7 million in the first year, and an LEA increase of \$3.4 million and a DPS increase of \$1.2 million in future fiscal years. As a result, this analysis estimates an increase in costs to DPS between \$1.7 million and \$6.8 million in FY24 and between \$1.2 million and \$4.5 million in future fiscal

years. The increase in costs to LEAs is estimated to be up to \$5.1 million in FY24, and up to \$3.3million in future fiscal years.

However, DPS believes any sort of reimbursement would be difficult to manage, and asserts implementing this bill would be more efficiently handled with a recurring budget increase. In addition, DPS advises there are several rural law enforcement agencies throughout the State in areas with underserved populations and small tax bases who do not have the financial capability to reimburse DPS for such expenditures.

In addition, Section G requires NMAG to work, in conjunction with DPS, any investigation in which an in-custody death or use of force resulting in great bodily harm or death is allegedly committed by a member of DPS. Based on use of force statistic and other information it has collected, NMAG estimates 35 investigations per year, costing \$450.7 thousand annually. This estimate only addresses personnel costs, travel and expert costs. Additional office space, overhead costs and management, and other support staff are not included. Further, it should be noted that SB265 does not provide for reimbursement for these costs.

Prosecution Costs. The average general fund cost of prosecution by a district attorney is about \$1,000 per case, although it is likely prosecutions of law enforcement officers, which are generally complex, and would require more resources. AODA asserts district attorney's offices would need an increase in staff to comply with in-custody death and great bodily harm cases for reporting purposes. AODA reports District Attorney's offices are currently short staffed, and some district attorney's office refer "in-custody death" cases to contract attorneys to review. The total number of incidents that will be prosecuted is more difficult to determine. It is unclear if or to what extent this law will result in more peace officers being prosecuted for such incidents than under current law, making the actual fiscal impact of the bill difficult to estimate.

In the event that a district attorney declines to exercise original prosecutorial jurisdiction, Section J provides that NMAG shall have jurisdiction to prosecute. NMAG estimates five prosecutions a year, at a cost of \$313.5 thousand. NMAG is entitled to reimbursement from the district attorney's office in the judicial district where the conduct is alleged to have occurred. Assuming that all costs may not ultimately be reimbursed, the estimated annual recurring cost to NMAG is up to \$313.5 thousand.

Other Cost Impacts. There may be some additional costs related to staff time (from police departments, sheriffs' offices, district attorneys' offices, NMAG, and the office of the Governor) necessary to comply with the reporting requirements of this bill.

It is also unclear if or to what extent this law would result in more peace officers being convicted of crimes and incarcerated within county jails or the state prison system. To the extent that the bill increases the prison population, NMCD would incur additional costs. NMCD reports the average cost to incarcerate a single inmate in FY22 was \$54.9 thousand; however, due to the high fixed costs of the state's prison facilities and administrative overhead, LFC estimates a marginal cost (the cost per each additional inmate) of \$26.6 thousand per inmate per year across all facilities.

AOC states there will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to the enforcement of this law and commenced prosecutions, and appeals from convictions. Prosecution of law enforcement officers, which are generally complex, would

require more court resources.

SIGNIFICANT ISSUES

Police Uses of Force. From 2016 to 2020, New Mexico had the second highest per capita rate of people killed by police in the country, according to two national databases. Between 97 and 108 individuals were killed by police, an average rate of 9.3 to 10.3 per million residents per year, while the average national rate of individuals killed by police ranged from 3 to 3.3 per million residents per year. Comparatively, New York, with over nine times New Mexico’s population, saw roughly the same number of people killed by police during this period (between 90 and 109 individuals, an average rate of 0.9 to 1.1 per million residents per year).¹

Very few incidents of police killings in New Mexico have resulted in the prosecution of the officer or officers involved. The most recent completed prosecution of police officers for death or great bodily harm of a civilian LFC staff could identify was the 2016 prosecution of the officers involved in the killing of James Boyd, which occurred in 2014, although in June 2020 an officer with the Las Cruces Police Department was charged with involuntary manslaughter related to an incident that occurred in February 2020. Whether the procedures outlined in this bill will result in additional prosecutions is unknown.

The Sentencing Commission (NMSC) notes that reforming officer-involved shooting investigation procedures has been at the forefront of recent initiatives to examine present police practices around the country. The agency believes the proposals in this bill are in line with proposals elsewhere in the country.

Reporting Requirements. DPS expresses concern that while an occurrence may be known and reportable within 24 hours, the details, including names of the individuals involved may not be. DPS has an internal policy (OPR: 29 Investigation of Use of Force Incidents Involving Death or Great Bodily Harm) that requires DPS to inform officers involved in these incidents that they are entitled to legal representation and are not to be interviewed for at least 48 hours. Sometimes the interviews are postponed for more than 48 hours in order to coordinate with the schedules of involved attorneys. Depending upon the situation, DPS may not know with certainty who among several officers were involved in a situation or what occurred for some time. DPS suggests the written notice to the district attorney requirement set forth in Subsection B. be changed from “[w]ithin twenty-four hours” to, “as soon as practicable following investigatory interviews of all officers believed to have knowledge of the in-custody death, or occurrence of death or great bodily harm preceded by a use of force.” Similarly, DPS suggests the written notice to the governor set forth in Subsection C. be changed to “within one week after receiving notice”, the district attorney shall report to the governor and the attorney general.

It is unclear if the reporting requirements contained in this bill will be sufficient to ensure accurate reporting by LEAs. For over a decade, state statute has required LEAs to report uniform

¹ Data on police killings sourced from the *Washington Post’s* Fatal Force project, which only includes fatal police shootings (<https://www.washingtonpost.com/graphics/investigations/police-shootings-database/>), and Mapping Police Violence (mappingpoliceviolence.org), which includes all police killings regardless of the cause of death. Population data to calculate rates of police killings sourced from the U.S. Census Bureau.

crime data to DPS; however, DPS has historically had problems ensuring complete reporting. The bill does not specify what (if any) consequences LEAs will face if they fail to report as required by the bill.

Additionally, DPS raises concerns about the requirement that the officers' names be included in these reports which will be public records. IPRA provides that the names of individuals suspected but not charged with crimes are not matters of public records. In addition, it notes that Subsection C requires the naming of the officers "who used physical force", even if ultimately any force used is found either to have no relation to the death or great bodily harm or, while related, found to have been appropriate. For both these reasons DPS does not believe the names of officers not charged with a crime should be made part of any report to the district attorney or governor which shall be a public record.

Probable Cause Hearings. As pointed out by NMSC and AODA, Subsection D requires a probable cause hearing, at which the prosecuting authority shall represent the state and is required to present evidence of a peace officers use of force and evidence of criminal offenses committed by the officer, which directives precede subsections dealing with investigating the in-custody death or great bodily harm or death resulting from a peace officer's use of force, and the prosecutor's responsibility for determining whether the facts and applicable law even allow for prosecution of an officer for criminal liability. Similarly, DPS believes both this subsection and Subsection E should be stricken.

Other Impacted Agencies. The State Parks Division of the Energy, Minerals and Natural Resources Department (EMNRD) employs up to 82 park rangers and other employees who are vested with police powers within state parks and recreation areas. This bill requires all LEAs to fully cooperate with and promptly respond to requests for information from the relevant prosecuting authority and the LEA or independent investigator charged with authority over the investigation. EMNRD noted in analyzing a similar bill in the 2021 session (HB 254/HPACS) that the statutory requirement for law enforcement officers to use body-worn cameras (Section 29-1-18 NMSA 1978) only applies to municipal police departments, sheriffs' offices, and state police, but does not apply to state park officers. Notably, while SB265 also applies to correctional officers, those officers are similarly not considered law enforcement officers for purposes of the body-worn camera requirement. Further, the cited section only imposes civil, not criminal, liability for its violation. DPS advises it does approve body-worn cameras for other LEAs and has no expertise to advise any agency which system might be best for it. Finally, both AODA and AOC call attention to the inclusion of a detoxification police-service aide in the definition of peace officer, noting that a public service officer (PSO) performing duties under the Detoxification Reform Act, Section 43-2-1 NMSA 1978 et. seq, is not a "peace officer" as a matter of law, because PSOs are not vested with a duty to maintain public order or to make arrests. See State v. Becenti, 2021-NMCA-060. Likewise, AODA points out the contradiction between the bill's definition and that found in the Criminal Code at Section 30-1-12(C) NMSA 1978.

ADMINISTRATIVE IMPLICATIONS

LEAs, district attorneys' offices, NMAG, and the Office of the Governor would need to establish procedures for complying with the provisions of this bill, including procedures related to the bill's reporting requirements and procedures applicable to prosecutions. DPS already handles many investigations into officer-involved-shootings; however, it may need to establish

procedures specific to the requirements of this law. Under the bill, both DPS and NMAG could see their workloads increase, so potential staffing shortages and recruitment difficulties could pose challenges to those agencies in taking on increased workloads.

CONFLICT/RELATIONSHIP

Relates to and may conflict with SB252, Law Enforcement Officers Procedures Act, requiring the creation of a use of force database and requiring the creation of a uniform protocol for law enforcement agencies to report officer-involved injuries of deaths.

TECHNICAL ISSUES

As AODA notes, Section 29-1-16 NMSA 187, which governs electronic recordings of custodial interrogations does not address the use of force, and the authority granted to NMAG in Subsection J to prosecute any unlawful use of force involved in the failure to comply with that provision is confusing. The grant of authority to prosecute a failure to record an incident of unlawful use of force by using a body-worn camera raises a similar question, since a failure to record as required by Section 29-1-18(B), NMSA 1978 imposes only civil liability.

OTHER SUBSTANTIVE ISSUES

DPS also comments on Subsection F, which identifies DPS as the “default primary investigative agency” charged with investigating all “in-custody death[s] and instances of a person suffering great bodily harm or death after a peace officer used force on that person” statewide. At the present time, DPS reports it participates in memoranda of understanding (MOU) with a number of law enforcement agencies, including Albuquerque Police Department, Bernalillo County Sherriff’s Office, Las Cruces Police Department, Dona Ana County Sheriff’s Office for the purpose of investigating officer involved shootings and other uses of force resulting in death or great bodily harm. However, pursuant to these MOUs, DPS is not always the lead agency. In those instances where DPS is not the lead agency, DPS sends two officers. In instances where DPS is the lead agency, typically there are two to three supervisors and six to seven investigative agents that respond. In addition, DPS also currently is the primary investigative agency for in-custody deaths occurring in the state prison system, but not for local jails.

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