SENATE BILL 189

55TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2021

INTRODUCED BY

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AN ACT

RELATING TO FINANCIAL EXPLOITATION; ENACTING THE FINANCIAL
EXPLOITATION ACT; CREATING REPORTING REQUIREMENTS; PROVIDING
FOR THE DELAY OF SUSPECT TRANSACTIONS; DESCRIBING TRAINING
REQUIREMENTS FOR FINANCIAL INSTITUTIONS; CREATING A CIVIL CAUSE
OF ACTION.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. Section 14-2-1 NMSA 1978 (being Laws 1947,
Chapter 130, Section 1, as amended) is amended to read:

"14-2-1. RIGHT TO INSPECT PUBLIC RECORDS--EXCEPTIONS.--
Every person has a right to inspect public records of this
state except:

A. records pertaining to physical or mental
examinations and medical treatment of persons confined to an
institution;
B. letters of reference concerning employment, licensing or permits;

C. letters or memoranda that are matters of opinion in personnel files or students' cumulative files;

D. portions of law enforcement records that reveal:
   (1) confidential sources, methods or information; or
   (2) before charges are filed, names, addresses, contact information or protected personal identifier information [as defined in this Act] of individuals who are:
      (a) accused but not charged with a crime; or
      (b) victims of or non-law-enforcement witnesses to an alleged crime of: 1) assault with intent to commit a violent felony pursuant to Section 30-3-3 NMSA 1978 when the violent felony is criminal sexual penetration; 2) assault against a household member with intent to commit a violent felony pursuant to Section 30-3-14 NMSA 1978 when the violent felony is criminal sexual penetration; 3) stalking pursuant to Section 30-3A-3 NMSA 1978; 4) aggravated stalking pursuant to Section 30-3A-3.1 NMSA 1978; 5) criminal sexual penetration pursuant to Section 30-9-11 NMSA 1978; or 6) criminal sexual contact pursuant to Section 30-9-12 NMSA 1978.

Law enforcement records include evidence in any form received or compiled in connection with a criminal investigation or
prosecution by a law enforcement or prosecuting agency, including inactive matters or closed investigations to the extent that they contain the information listed in this subsection; provided that the presence of such information on a law enforcement record does not exempt the record from inspection;

    E. as provided by the Confidential Materials Act;
    F. trade secrets, attorney-client privileged information and long-range or strategic business plans of public hospitals discussed in a properly closed meeting;
    G. tactical response plans or procedures prepared for or by the state or a political subdivision of the state, the publication of which could reveal specific vulnerabilities, risk assessments or tactical emergency security procedures that could be used to facilitate the planning or execution of a terrorist attack; [and]
    H. as provided by the Financial Exploitation Act; and
    [H.]
    I. as otherwise provided by law."

SECTION 2. [NEW MATERIAL] SHORT TITLE.--Sections 2 through 10 of this act may be cited as the "Financial Exploitation Act".

SECTION 3. [NEW MATERIAL] DEFINITIONS.--As used in the Financial Exploitation Act:

    A. "caregiver" means a person who has been
entrusted with or who has assumed responsibility for the care
of an eligible adult or the eligible adult's property and may
include a family member that is related to the eligible adult
by blood or marriage; a court-appointed guardian or
conservator; an adult living in the same household as the
eligible adult; a health care provider; or an employee or
volunteer of an adult daycare, assisted living or residential
care facility, group home, nursing home, hospital, mental
health treatment center or continuing care community or a
service provider of such entity;

B. "confidential relationship" means a relationship
of confidence and trust between an eligible adult and another
person, including but not limited to a family member; business
associate or partner; financial advisor; caregiver; health care
or mental health care provider; legal professional; or clergy
member, imam, minister, priest, rabbi or similar religious or
spiritual advisor;

C. "eligible adult" means a person eighteen years
of age or older with cognitive impairment or a mental, physical
or developmental condition or a person who is experiencing
other circumstances that cause the person to be susceptible to
undue influence or substantially impaired in the ability to
provide adequately for the person's personal or financial
affairs or protection, regardless of whether the person has
been adjudicated pursuant to Section 45-5-303 NMSA 1978;
D. "fiduciary relationship" means an agreement or arrangement that creates fiduciary duties owed from one person to another and includes the relationship between a principal and an attorney-in-fact pursuant to a power of attorney; a conservator and a protected person; a trustee and a beneficiary; a financial advisor or broker and an account owner; or a representative payee and a beneficiary;

E. "financial exploitation" means:

(1) the wrongful or unauthorized taking, conversion, withholding, appropriation or use of an eligible adult's assets, including money or other property; or

(2) an act or omission taken by a trusted person to obtain the benefit, control or use of an eligible adult's assets, including money or other property, through the use of deception, intimidation or undue influence;

F. "financial institution" means an organization authorized to do business pursuant to state or federal laws relating to financial entities and includes a bank, trust company, savings bank, building and loan association, savings and loan company or credit union;

G. "qualified individual" means a person designated by a financial institution to conduct a review of suspected financial exploitation, report suspected financial exploitation or delay transactions and receive training pursuant to the provisions of the Financial Exploitation Act;
H. "transaction" means an agreement; contract; conveyance; deed; encumbrance; gift; guarantee; loan; mortgage; pledge; purchase; sale; title transfer; transfer of money, security or other financial asset or real or personal property; or withdrawal from a financial, investment or securities account or changes to ownership on such account, but excludes wills, trusts or transfer on death designations or instruments of a similar type;

I. "trusted person" means:

(1) a caregiver, health care or mental health care provider;

(2) a person upon whom an eligible adult is dependent and with whom the eligible adult has a confidential or fiduciary relationship; or

(3) a person in a position of authority, including an eligible adult's family member, financial advisor, legal professional, clergy member, imam, minister, priest, rabbi or similar religious or spiritual advisor; and

J. "undue influence" means excessive persuasion or domination of the decision-making process of an eligible adult by a trusted person that causes an eligible adult to consent to a transaction or refrain from consenting to a transaction that would reasonably be expected to result in financial harm to the eligible adult, including controlling the eligible adult's interaction with others, access to information or necessaries
of life; using affection, intimidation or coercion; or
initiating changes in the eligible adult's personal or property
rights in haste, secrecy or at inappropriate times and places.
The fact that an eligible adult had independent legal counsel
with respect to the transaction is evidence that the
transaction was not the product of financial exploitation, but
shall not be dispositive on whether the issue of financial
exploitation occurred.

SECTION 4. [NEW MATERIAL] REPORTING FINANCIAL
EXPLOITATION.--

A. When a qualified individual reasonably believes
that financial exploitation of an eligible adult may have
occurred, may have been attempted or is being attempted, a
qualified individual:

(1) shall promptly notify the financial
institutions division of the regulation and licensing
department and the adult protective services division of the
aging and long-term services department;

(2) shall attempt to notify a third party
previously designated by the eligible adult; and

(3) may attempt to notify a third party that
is not designated but is known by the qualified individual to
be reasonably associated with an eligible adult.

B. A qualified individual shall not disclose
information to a third party who is suspected of financial
exploitation or other abuse of the eligible adult.

SECTION 5. [NEW MATERIAL] IMMUNITY FOR REPORTING

FINANCIAL EXPLOITATION.--A qualified individual who exercises reasonable care on behalf of a financial institution and complies with the provisions of Sections 4 and 8 of this 2021 act shall be immune from liability that might otherwise arise from such disclosure, as shall the financial institution.

SECTION 6. [NEW MATERIAL] DELAY OF SUSPECT TRANSACTIONS.--

A. A financial institution may delay a disbursement or transaction from an account of an eligible adult or an account for which the eligible adult is a beneficiary if:

(1) after initiating an internal review of the requested disbursement or transaction, a qualified individual reasonably believes that the requested disbursement or transaction may result in financial exploitation of the eligible adult; and

(2) the financial institution:

(a) provides written notification of the delay and the reason for the delay to all parties authorized to transact business on the account no later than two business days after the requested disbursement or transaction, unless any such party is reasonably believed to have attempted the financial exploitation of the eligible adult;

(b) notifies the financial institutions
division of the regulation and licensing department and the
adult protective services division of the aging and long-term
services department no later than two business days after the
requested disbursement or transaction; and

(c) at the request of the financial
institutions division of the regulation and licensing
department, provides a status report of the internal review
required pursuant to Paragraph (1) of Subsection A of this
section.

B. Any delay of a disbursement or transaction as
authorized pursuant to this section shall expire upon the
sooner of:

(1) a written determination by the financial
institutions division of the regulation and licensing
department that the disbursement or transaction will not result
in financial exploitation of the eligible adult; or

(2) fifteen business days from the date that
the financial institution first delayed the disbursement or
transaction unless either the financial institutions division
of the regulation and licensing department or the adult
protective services division of the aging and long-term
services department makes a written request that the financial
institution extend the delay, in which case the delay shall
expire twenty-five days from the date that the financial
institution first delayed the disbursement or transaction,
unless otherwise terminated or extended by either of the
divisions or by a court order.

C. A court may enter an order extending the delay
of the disbursement or transaction or may order other
protective relief based on a petition of the director of the
financial institutions division of the regulation and licensing
department, the director of the adult protective services
division of the aging and long-term services department, the
financial institution that instituted the delay pursuant to
this section or any other interested party.

SECTION 7. [NEW MATERIAL] IMMUNITY FOR DELAY IN SUSPECT
TRANSACTIONS.--A financial institution or qualified individual
that exercises reasonable care and is in compliance with
Sections 6 and 8 of this 2021 act, shall be immune from
administrative and civil liability that might otherwise arise
from such delay in a disbursement or transaction pursuant to
Section 6 of this 2021 act.

SECTION 8. [NEW MATERIAL] TRAINING TO IDENTIFY FINANCIAL
EXPLOITATION.--

A. The director of the financial institutions
division of the regulation and licensing department shall
promulgate rules pertaining to training guidelines and
standardized training curriculum guidelines that financial
institutions may use to train qualified individuals to review,
delay and report transactions that are identified to have
potentially resulted from financial exploitation. A financial
institution may develop its own training as approved by the
director of the division. The training required pursuant to
this section shall include a description of indicators of
financial exploitation of an eligible adult and the process for
reporting suspected financial exploitation internally and to
the division and the adult protective services division of the
aging and long-term services department.

B. A financial institution shall provide training
regarding the financial exploitation of eligible adults to
qualified individuals designated by a financial institution
pursuant to Section 3 of the Financial Exploitation Act.

SECTION 9. [NEW MATERIAL] DISCLOSURE OF INFORMATION.--A
financial institution shall provide access to records or copies
of records that pertain to the suspected or attempted financial
exploitation of an eligible adult to the financial institutions
division of the regulation and licensing department and the
adult protective services division of the aging and long-term
services department as part of a referral to the divisions and
to law enforcement in the course of an investigation. Relevant
records may include historical records or records relating to
recent transactions that may serve as evidence of financial
exploitation of an eligible adult. A record made available
pursuant to this section shall not be considered a "public
record" as defined in Subsection G of Section 14-2-6 NMSA 1978.
Nothing in this section shall be construed to otherwise impede
the authority of the director of the securities division of the
regulation and licensing department to access or examine the
records of brokers and investment advisors as otherwise
provided by law.

SECTION 10. [NEW MATERIAL] CIVIL REMEDIES.--

A. An eligible adult or an attorney-in-fact,
conservator, temporary conservator or trustee acting for or on
behalf of an eligible adult may commence a civil action in a
court of competent jurisdiction against a person suspected of
financially exploiting an eligible adult in order to:

   (1) return property;

   (2) stop or enjoin a transaction;

   (3) return any profit received from a
transaction;

   (4) seek compensatory damages for a
transaction; or

   (5) void or rescind a transaction.

B. To prevail on a claim made pursuant to this
section, the plaintiff shall prove by a preponderance of the
evidence that financial exploitation occurred.

C. Punitive damages shall be awarded when a
plaintiff proves that the defendant committed financial
exploitation and:

   (1) acted with knowledge that the transaction
was wrongful;

(2) made a transaction in indifference or Needless to cure the alleged financial
reckless disregard for the financial interests of the eligible exploitation within fifteen days of receiving notice of intent
adult that resulted in financial harm to the eligible adult; to seek relief from the plaintiff.

D. If a plaintiff prevails against a defendant on a
financial exploitation claim, the plaintiff shall recover reasonable attorney fees and any costs incurred while pursuing such relief.

E. A remedy obtained pursuant to this section shall not limit in any way the right, title and interest of a good faith purchaser, mortgagee, holder of a security interest or other third party who obtains an interest in property transferred from an eligible adult.

F. Relief obtained pursuant to this section shall not affect the value of a mortgage.

G. Nothing in this section shall limit any other cause of action under the laws of this state.

H. When a plaintiff dies during the course of a civil proceeding initiated pursuant to this section, the personal representative of the plaintiff's estate may continue with the proceeding; provided that no proceeding made pursuant
to this section shall be initiated after the plaintiff's death.

I. A person who is found to have committed financial exploitation is liable for payment of the following to the eligible adult:

(1) the amount of restitution required to restore the value of the property that the eligible adult would have had if the financial exploitation had not occurred; and

(2) any profit the defendant received through the financial exploitation.

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