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FISCAL IMPACT REPORT

SPONSOR Munoz ORIGINAL DATE 01/31/17
 LAST UPDATED _____ HB _____

SHORT TITLE IPRA Exceptions for Employment SB 93

ANALYST Amacher

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY18	FY19		
None	None		

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Central New Mexico Community College (CNM)
 Department of Finance and Administration (DFA)
 Eastern New Mexico University (ENMU)
 New Mexico Department of Transportation (NMDOT)
 New Mexico Higher Education Department (NMHED)
 New Mexico Municipal League (NMML)
 New Mexico State University (NMSU)
 Office of the Attorney General (AGO)
 State Personnel Office (SPO)

SUMMARY

Synopsis of Bill

Senate Bill 93 amends the Inspection of Public Records Act to provide for certain exceptions to public inspection of applicants for employment. In the event an applicant for public employment becomes the finalist for the head of any agency, state institution or political subdivision of the state, SB 93 requires a prominently displayed web posting of the applicant's resume on the agency's website no fewer than seven days prior to the final decision to hire. If enacted, SB 93 becomes effective June 16, 2017.

FISCAL IMPLICATIONS

There are no known fiscal impacts.

SIGNIFICANT ISSUES

Senate Bill 93 amends the Inspection of Public Records Act (IPRA) to provide for certain exceptions to public inspection of applicants for employment. The provisions outlined in SB 93 require a prominently displayed web posting of the applicant's resume on the agency's website no fewer than seven days prior to the final decision to hire. This is specific to the applicant for public employment who becomes the finalist for the head of any agency, state institution or political subdivision of the state. SB 93 adds an exception to a list of exceptions from IPRA.

As proposed, SB 93 conflicts with other state law. DFA notes that due to the nature of the hiring process for agency heads (specifically cabinet secretaries), (Chapter 9-1-4 NMSA 1978), and that the selection process and final section is the sole determination of the governor, it does not appear that it would be feasible to meet the seven day requirement for posting of resumes. SPO expressed concern that SB 93 impedes on the executive right as outlined in Article 5 of the New Mexico Constitution that provides the governor the power to appoint all officers. The mandate for an online posting be made seven days prior to the final decision to hire the head of an agency impedes on the governor's power to appoint an officer.

The State Personnel Board rules have provided confidentiality to certain records found in an employee's personnel file (Rule 1.7.1.12 NMAC). To name just a few of such exemptions: records and documentation pertaining to physical or mental illness, injury or examination; sick leave and medical treatment of person; records and documentation maintained for purpose of the American with Disabilities Act; letters of reference concerning employment, college transcripts; military discharge; information on race, color, religion, sex, national origin, age and disability, and social security number. These are consistent with IPRA. Notably, SB 93 mandates an exception by requiring the resume and name of the finalist for the head of any agency, state institution or political subdivision of the state be available as a web post on the agency's website.

The AGO notes that as written, SB 93 exempts a public body from disclosing records that would reveal the identity of an applicant for public employment. This covers every application for any position with the state or any of its political subdivisions. However, only the resume and name identifying of the finalist of an agency head, state institution or political subdivision will be available on the public body's website. Therefore, as expressed by the AGO, public records relating to an application for every other position, except the "head" of a public body, would be permanently exempt from production.

Additionally, as highlighted by the AGO, IPRA applies to producing public records to members of the public who request such records. Nowhere in the IPRA, as written, is there a duty imposed on a public body to affirmatively post a resume or name of finalist seeking employment on its website, if it maintains one. SB 93 would require a public body to post the resume and name of the finalist for the agency head on its website with or without a request. This would be the first and only requirement in the IPRA to do so.

NMDOT expresses the provisions in SB 93 present a departure from the premise and mechanics of IPRA by making it a requirement that state entities must make such information available.

NMDOT suggests it appears more suited as an amendment to the Sunshine Portal Transparency Act (Chapter 10-16D-1 through 10-16D-6 NMSA 1978).

TECHNICAL ISSUES

As recommended by the AGO, the term “entity’s” as used in SB 93 is not defined in IPRA. The language should be stricken and be replaced with “public body’s”, for which IPRA is applicable.

OTHER SUBSTANTIVE ISSUES

SB 93 does not outline the time period for which the web posting is to remain. Penalties that would be imposed should a public entity fail to timely post the required information are not identified.

NMDOT notes that compliance with the provisions outlined in SB 93 is most problematic because the cabinet secretary position is one vetted by the governor, and not the agency itself. Being able to post the finalist candidates’ resumes may be beyond the ability of state agencies to comply.

The AGO notes the phrase “records that reveal the identity of an applicant” has no standard for implementation. When determining which records would reveal the identity of an applicant is subjective and could open up the public body to an enforcement action from a requester who feels records were withheld inappropriately. Also, the public body must be aware that they are still responsible for producing non-exempt records and information in an application that does not reveal the identity of an applicant for public employment.

NMSU highlights that the resulting level of disclosure, if SB 93 were enacted, could impact the employment decisions by the agencies in judging whether the finalist appears qualified, has some negative factor in his or her background, or whether there appears to be some kind of cronyism involved. However, NMSU states that while these are legitimate concerns, they do not require the disclosure of the identities of all the applicants who were not selected. Media outlets have the option of requesting documents through the current provisions of IPRA; and are entitled to inspect any related records subject to the redaction of information that would reveal the identities of the applicants. Public disclosure of an applicant’s identity is simply not necessary in order to judge the basic soundness of a hiring process.

As noted by many of the responding agencies, IPRA is a means by which applicants may review other applications to a position. This may occur when an individual does not receive an offer the position and wish to review in an effort gain insight as to why others have been selected. NMSU adds that New Mexico will continue to be at a disadvantage in recruiting the most highly qualified individuals for our state and local governments and institutions unless laws are enacted protecting the identities of applicants similar to the practice adopted by a large majority of other states.

As provided by NMSU, SB 93 applies an approach similar to adopted legislation from 1999 for the selection of presidents for the state’s higher education institutions. Chapter 21-1-16.1 NMSA 1978) requires the identification of five finalists twenty-one days prior to the final hiring decision. In addition, NMSU suggests this legislation may reverse the decision of the New Mexico Court of Appeals in *City of Farmington v. Daily Times*, 2009-NMCA-057, which

interpreted the current Inspection of Public Records Act to require the public disclosure of the names of all applicants for the position of City Manager.

CNM feels that the release of any information regarding personal and professional experience related to unsuccessful candidates is an overreach of IPRA. Additionally, CNM would argue that the release of information regarding a presumed finalist prior to the completion of a hire would overstep that citizen's privacy protections. CNM fully supports making the name and professional/educational experience of the selected candidate an inspectable element, once a hire is complete.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Employment applications, which would include names and resumes, will continue to be available through the current IPRA provisions.

JMA/sb