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## FISCAL IMPACT REPORT

SPONSOR Martinez ORIGINAL DATE 3/07/17  
 LAST UPDATED \_\_\_\_\_ HB \_\_\_\_\_

SHORT TITLE Recording of Custodial Interrogations SB 468

ANALYST Rogers

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>	\$0.0	Minimal	Minimal	Minimal	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates HB 379.

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Administrative Office of the Courts (AOC)  
 Bernalillo County Metropolitan Court (BCMC)  
 Office of the Attorney General (OAG)  
 Department of Public Safety (DPS)

### SUMMARY

#### Synopsis of Bill

Senate Bill 468 amends Section 29-1-16 NMSA 1978 to provide that a custodial interrogation is inadmissible in a judicial proceeding unless a state or local law enforcement officer complies with specified procedures when conducting the interrogation, rather than requiring the officer to comply when reasonably able to do so.

SB 468 requires the officer to comply with the specified procedures unless the officer has good cause not to electronically record the entire custodial interrogation and, at the time of the interrogation, the officer makes a written or electronic record of the reasons for not recording the entire custodial interrogation. SB 468 removes from the list of “good cause” factors, that the equipment failed and obtaining replacement equipment was not feasible, and that the individual refused to be recorded, while retaining as factors that the electronic recording equipment was not reasonable available or the statement was made in a court proceeding or a grand jury proceeding.

## FISCAL IMPLICATIONS

Agencies responding report minimal fiscal impact.

## SIGNIFICANT ISSUES

The AOC submits the following detailed analysis:

1) Currently, Section 29-1-16 NMSA 1978 requires a law enforcement officer to comply with specified procedures for conducting a custodial interrogation “when reasonably able to do so.” The law will likely have fewer challenges to the admissibility of a custodial interrogation in stating that a custodial interrogation is inadmissible in a judicial proceeding unless the officer complies with the procedures, as well as removing the good cause factors of electronic equipment failure and unfeasibility of obtaining replacement equipment, or that the individual refused to be recorded, that would permit an officer to not record a custodial interrogation. Given the stringency and clarity of the SB 468 amendments, including the requirement that every custodial interrogation be recorded in its entirety, there may be fewer challenges to admissibility. However, there may also be fewer recordings that meet SB 468’s more stringent requirements.

2) According to the Harvard Law Review in a March 2015 report, since 2003 the number of states requiring law enforcement officers to electronically record some or all interviews conducted with suspects in their custody has grown from two to at least 22. Additionally, as of May 2014, the Department of Justice created a presumption that Federal Bureau of Investigation (FBI), Drug Enforcement Administration (DEA), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) and U.S. Marshals will electronically record custodial interviews. See, [\*Department of Justice, New Department Policy Concerning Electronic Recording of Statements\*](#), 128 Harv. L. Rev. 1552 (March 10, 2015). For a policy review of the electronic recording of custodial interrogations by The Justice Project, including a model policy, see the following [report](#).

The OAG also submitted a detailed analysis:

Under this bill, the “reasonably able” language in Subsection A would be deleted and custodial interrogations would be inadmissible unless recorded in their entirety.

It is unclear how Subsection B – purportedly containing the exceptions to this rule – would work with the new Subsection A. If an unrecorded custodial interrogation is inadmissible regardless of whether the officer was “reasonably able” to record it, could *any* “good cause” exceptions apply? As written, the new Subsection A appears to conflict with Subsection B.

This does not appear to be the intent, as the bill does not delete Subsection B in its entirety and only limits the number of “good cause” exceptions from four to two. The title of the bill also purports only to limit the exceptions to the recording requirement. It would be helpful to note in Subsection A that its provisions are subject to the provisions in Subsection B. Otherwise, it is unclear how the two subsections operate together.

Subsection B deletes the “good cause” exceptions that the recording equipment is not working and the exception that the individual refuses to be recorded. The subsection does not otherwise limit the possible exceptions in its use of the phrase “good cause includes.”

Subsection I provides that “[t]his section shall not be construed to exclude otherwise admissible evidence in any judicial proceeding.” This subsection has not been changed and there is no case law to illuminate its meaning. It is unclear how this subsection would work with subsections A and B. It is not clear what “otherwise admissible evidence” means in this context. Generally, a suspect’s statement is admissible if it complies with *Miranda* and is otherwise voluntary. These two claims are distinct – whether a statement is voluntary is a due process issue whereas *Miranda* involves the Fifth Amendment. *See e.g. State v. Fekete*, 1995-NMSC-049, ¶ 33, 120 N.M. 290 (“A claim that the police coerced a statement requires a different analysis than a claim that an accused voluntarily waived his or her Fifth Amendment protections under *Miranda v. Arizona*, 384 U.S. 436 . . . (1966)”). It is not clear if Subsection I is intended to apply to statements which have been held admissible under these separate constitutional protections. If so, it is also unclear how Subsection A’s proposed proscription on *any* unrecorded custodial interrogation in a judicial proceeding applies.

DPS explains:

The admissibility of evidence in legal proceedings is more commonly decided by courts based on rules of evidence, rules of criminal procedure, the constitutionality of how evidence was obtained, and other related analysis depending on the case before the court. Adding language to the statute that would require exclusion of custodial interrogations as the statute specifies, diminishes the court’s ability to make determinations as to the admissibility of this evidence and to independently determine whether the evidence would properly assist a trier of fact.

In cases where courts have permitted evidence from an investigation to be presented to a jury over one side’s objections, courts have still commonly permitted attorneys to ask questions before a jury, such as whether and why a portion of an investigation was not recorded. In those instances, juries have been able to decide for themselves what weight certain evidence should be given based on the responses given to the attorney’s questions.

Requiring automatic exclusion could also have certain unintended implications. For instance, at times statements made during custodial interrogations can be helpful to a defendant’s case because it would be consistent with the theme of the defense and add credibility to the other evidence the defense wishes to present, or even contain evidence that is exculpatory for a co-defendant. The language in this bill could lead to exclusion of that evidence.

## PERFORMANCE IMPLICATIONS

AOC explains the courts are participating in performance-based budgeting. SB 468 may have an impact on the measures of the district courts in cases disposed of as a percent of cases filed and percentage change in case filings by case type.

DPS explains “as written, the bill removes two express examples of what is considered ‘good cause’ for not recording. One involves the failure of electronic equipment. This is impractical as electronic equipment can fail for a variety of reasons, outside of the officer’s control, stemming from a simple low or unexpected dead battery to greater network failures and everything in between. As written in the bill, if an electronic failure occurs, it would be ambiguous whether the statement would automatically be deemed inadmissible. The second example of ‘good cause’ that this bill removes is if the individual refuses to be recorded. This is problematic because some individuals will simply not give a statement if they are being recorded. The statement should still be obtained and the admissibility can be determined by the judge overseeing the case, based on the rules of evidence, procedure, and constitutional analysis.”

TR/al