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FISCAL IMPACT REPORT

SPONSOR Sedillo Lopez ORIGINAL DATE 01/23/21
LAST UPDATED 02/07/21 HB _____
SHORT TITLE State Agency Disclosure of Sensitive Info SB 75
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)

Duplicates House Bill 124.

SOURCES OF INFORMATION

LFC Files

Responses Received From

New Mexico Attorney General (NMAG)

Department of Health (DOH)

State Personnel Office (SPO)

State Ethics Commission (SEC)

SUMMARY

Synopsis of Bill

Senate Bill 75 amends the Governmental Conduct Act to provide protections for “sensitive personal information,” specifically “status as 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,” and “social security number or individual tax identification number.”

It would allow for the release of the information under eight exceptions, including when necessary to carry out the function of a state agency, when required by federal statute or the Inspection of Public Records Act (IPRA), when necessary to comply with a court order or subpoena, or with the written consent of the person whose information would be disclosed.

The law would be effective July 1, 2021.

FISCAL IMPLICATIONS

The State Ethics Commission indicates that enactment of SB75 is likely to increase their administrative caseload resulting in additional costs relating to the adjudication of ethics complaints. The bill does not include an appropriation.

SIGNIFICANT ISSUES

Existing state law (NMSA 7-1-8; NMSA 10-16-3(A); NMSA 10-16-6; NMSA 14-3A; NMSA 43-1-19) and federal law (Health Insurance Portability and Accountability Act, 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 SB75, for data categorized by the bill as sensitive, duplicate the protections in place in existing state and federal statute (for example social security numbers are deemed confidential by the United States Social Security Act). Additionally, both state and federal law provide exceptions to sharing confidential data, and it is unclear if those would apply to the proposed restrictions of sensitive data proposed in SB75. For example, HIPPA allows data-sharing for research purposes.

SB75 could also introduce additional ambiguity to interpretation of existing law in relationship to data-sharing among agencies and the IPRA. The State Ethics Commission points out that it is unclear whether SB75 could limit or significantly constrain the sharing of “sensitive personal information” where agencies have entered data sharing agreements. Along these lines, several projects underway with the goal of building integrated data systems using data from multiple state agencies, including the HHS 2020 project based at HSD, could potentially be impacted by the enactment of SB75. Previous LFC staff reports have cited difficulties in data-sharing among state and local agencies noting agencies are reluctant to share data citing concerns with sharing confidential information in state and federal law. Currently, data is sometimes shared among agencies through agreements (e.g. memoranda of understanding) setting out protections for confidential data. Given SB75 restricts sharing of data to anyone outside of a state agency, it is unclear if these types of data sharing agreements would remain allowable under existing law. A number of other states including Indiana, Massachusetts, New Jersey, and West Virginia have enacted law to facilitate data collection and exchange among state agencies and researchers. Such a provision for data-sharing among state agencies could address this issue.

The office of Attorney General (NMAG) indicates the provision in SB75 permitting disclosure of sensitive personal information when required by IPRA would create ambiguity because IPRA *requires* disclosure except as otherwise required 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.

Similarly, SB75 permits the disclosure of information when “necessary to carry out a function of the state agency” and IPRA provides that providing public records is a function of all public bodies, creating real ambiguity on the responsibilities of state agencies. From NMAG: “Because violations of the Governmental Conduct Act are criminal offenses, state agencies would potentially face a dilemma of either running the risk of a criminal penalty for violating the Governmental Conduct Act or facing a civil penalty for violating IPRA.”

The Department of Health (DOH) notes it receives hundreds of requests under the IPRA each year and redacts personal, identifying information, but restricted information is sometimes inadvertently released. “SB75 would drastically alter the confidentiality of sensitive personal information, as defined in the bill, and would expand potential penalties for state employees and state agencies for accidental or deliberate disclosure of such information” the agency reports.

DOH indicates that passage of SB75 “could potentially re-assure immigrant and refugee populations that their status would not be shared with outside agencies.” Indicating that it also might decrease vaccine hesitancy in vulnerable populations. DOH indicates the bill also serves to reflect enforcement of Chapter 7 of the Privacy and Confidentiality Policy Manual on personally identifiable information as enforced by the US Citizenship and Immigration Service.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

The State Ethics Commission points out that existing state statute already prohibits some of the conduct that SB75 targets stating “Sections 10-16-3(A) and 10-16-6 already prohibit some conduct that Senate Bill 75 targets: for example, Section 10-16-3(A) already prohibits a state employee from selling an individual’s sensitive personal information that the state employee acquired through their position of state employment. Section 10-16-3(A) also would prohibit a state employee from disclosing an individual’s sensitive personal information to further a private purpose, including a purpose not required by law or connected to the state agency’s mission.”

House Bill 124 differs only in the title.

OTHER SUBSTANTIVE ISSUES

The Department of Health reports it could be significantly restricted in its ability to release health information as allowed under exceptions to the federal Health Insurance Portability and Accountability regulations. The agency notes SB75 allows for disclosure of the restricted information when “required” by federal statute but does not except information *permitted* to be shared under federal law.

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

A number of other states, including Indiana, Massachusetts, New Jersey, and West Virginia, have enacted law to facilitate data collection and exchange among state agencies and researchers. Such a provision for data-sharing among state agencies could address this issue.

Office of Attorney General recommends amending proposed subsection (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.