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FISCAL IMPACT REPORT

ORIGINAL DATE 2/14/22

SPONSOR SHPAC LAST UPDATED _____ HB _____

SHORT TITLE GPS Data for Pretrial Release SB 225/ec/SHPACS

ANALYST Tolman/Courtney

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY22	FY23	FY24	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	No or Minimal Fiscal Impact – See Fiscal Implications				Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Conflicts with House Bill 5

Relates to House Joint Resolution 4, House Bill 27, Senate Bill 156, and Senate Bill 189

Relates to Appropriations in the General Appropriation Act

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)

Office of the Attorney General (NMAG)

Responses Not Received From

Public Defender Department (PDD)

Sentencing Commission (NMSC)

Department of Public Safety (DPS)

Administrative Office of the District Attorneys (AODA)

SUMMARY

Synopsis of Bill

The Senate Health and Public Affairs Committee substitute for Senate Bill 225 requires any public agency in possession of global positioning system data on a defendant on pretrial release to make that data available to law enforcement when requested as part of a criminal investigation. SB225 specifies that law enforcement may request immediate access to the data if it is involved in an investigation of certain violent crimes, including first degree murder, first or second degree felony human trafficking of a child, first degree felony abuse of a child, sexual exploitation of a child in the second or first degree, a serious violent offense as provided in Subparagraphs A through N of Paragraph 4 of Subsection L of Section 33-2-24 NMSA 1978, a

felony during which a firearm was discharged or brandished, and a felony resulting in great bodily harm or death.

This bill contains an emergency clause and would become effective immediately upon signature by the governor.

FISCAL IMPLICATIONS

Currently, electronic location monitoring is only conducted in the 2nd Judicial District, 6th Judicial District, San Juan County and Sandoval County. According to the Administrative Office of the Courts (AOC), an average of 144 defendants are monitored each day in the 2nd Judicial District (with a capacity of up to 160), while 25 to 30 are monitored in San Juan County (capacity of up to 35), 15 are monitored in Sandoval County (capacity up to 20), and six to eight are monitored in the 6th Judicial District.

SB225 would not change the nature or extent of electronic monitoring of pretrial defendants nor require additional judicial districts or counties to adopt electronic monitoring. Thus, this analysis assumes it would not result in fiscal impacts due to the cost of electronic monitoring equipment or staffing required to monitor defendants and investigate potential violations. However, AOC notes the amount of staff time required to respond to each request is unknown, as are the number of cases the bill would impact on a daily, weekly, or monthly basis. If the volume of requests was significant, additional local or state pretrial staffing may be necessary. The requirement to provide data immediately for certain criminal investigations could result in additional costs (see technical issues).

SIGNIFICANT ISSUES

Data Sharing and Confidentiality. Specific rules governing confidentiality of pretrial services records and circumstances under which data on individual defendants collected during pretrial supervision may be shared with law enforcement, district attorneys, defense counsel, or the public do not exist in either state statute or Supreme Court rules. The 2nd Judicial District Court shares such records with law enforcement and the district attorney through warrants issued by a judge, under subpoenas, through stipulated protection orders, pursuant to judicial order, or as part of hearings in which the state alleges violations of conditions of release. Electronic monitoring data is rarely released by the court in its entirety. Rather, the court releases data for specific time periods related to specific allegations against defendants, and law enforcement or the district attorney are required to present some evidence to support those allegations, unless the parties, including defense counsel, agree to a stipulated protected order. To obtain a warrant, they must meet the standard of probable cause while lower standards usually apply to data released through subpoena or hearings on conditions of release. The court also reviews the information to limit the release of data protected by the Health Insurance Portability and Accountability Act (HIPAA). SB225 appears to grant law enforcement broader access to electronic monitoring than is currently available, possibly including all historical data on some defendants.

SB225 does not place any restrictions on what law enforcement may do with electronic monitoring data after they receive it. It may be desirable to specify the Legislature's intent as to how these records may be used. It is also unclear if these records would be subject to the Inspection of Public Records Act (IPRA). Whether these records are subject to IPRA when held by the court is the subject of active litigation; it is not clear if the records being held by another party might impact the act's applicability.

AOC provides the following analysis regarding these issues:

In New Mexico, rules exist for probation program work product and confidentiality (see Section 31-21-6 NMSA 1978); however, similar rules do not exist for pretrial supervision program data. Other states have developed policies for information sharing that recognize the role of pretrial supervision programs while providing for public safety.

The National Association of Pretrial Services Agencies (NAPSA) Standard 4.7 addresses the issue of developing policy for pretrial agency information: “The pretrial services agency should have written policies regarding access to defendant information contained in the agency’s files. These policies should mandate that information obtained during the pretrial investigation, monitoring, and supervision should remain confidential and not be subject to disclosure, except in limited circumstances.”

Constitutional Concerns. In analysis submitted on House Bill 5, which would also require electronic monitoring data sharing at the request of law enforcement and others, the Public Defender Department (PDD) expressed significant concerns regarding the constitutionality of allowing access to location data to other entities under the U.S. and New Mexico constitutions:

The HJC-Substitute for HB5 would mandate that the entity overseeing pretrial supervision, shall turn over GPS location data for a defendant on pretrial release upon request by a law enforcement agency, district attorney, public defender, or office of the attorney general. The bill requires no factual basis justifying the request, creating the potential for abuse and implicating the privacy interests protected by the Fourth Amendment to the US Constitution and Article II, Section 10 of the New Mexico Constitution. It also provides no assurance that the data, once acquired by the requesting entity, would not become publicly available or subject to an IPRA request, leading to potential for serious intrusions into privacy and risk to defendants’ safety.

Location data carries a significant privacy interest that otherwise requires probable cause and a warrant. The United States Supreme Court recently addressed the privacy interests in location data in *Carpenter v. United States*, 138 S. Ct. 2206, 2211-12, 2217 (2018).

PDD emphasized that HB5, “permits law enforcement access the data without *any* factual basis whatsoever. This is likely to run afoul of Article II, Section 10, if not the Fourth Amendment as well.” SB225 requires law enforcement to make data requests in connection with a criminal investigation but does not specify a legal standard law enforcement would have to meet to access the data.

Also in response to HB5, the Sentencing Commission noted:

Some scholars have noted that electronic monitoring implicates the Fourth Amendment. A statute such as the one proposed here, which seems to allow the electronic monitoring data to be turned over to law enforcement or prosecutors without a warrant, might be in significant tension with the Fourth Amendment.

See Weisburd, “Sentenced to Surveillance: Fourth Amendment Limits on Electronic Monitoring”, *North Carolina Law Review* (2020) (available here: <https://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=6783&context=nclr>). Additionally, there are concerns when the use of electronic monitoring drives defendants into debt. See Kofman, “Digital Jail: How Electronic Monitoring Drives Defendants Into Debt”, *Pro Publica* (2019) (available here: <https://www.propublica.org/article/digital-jail-how-electronic-monitoring-drives-defendants-into-debt>). For more general concerns over the expanded use and efficacy of electronic monitoring, see “Electronic Monitoring”, *Electronic Freedom Foundation* (2019) (available here: <https://www.eff.org/pages/electronic-monitoring>).

Effectiveness of Electronic Location Monitoring. States currently use electronic monitoring in a wide variety of settings, such as a pretrial supervision alternative to jail, an alternative to imprisonment for some offenders, and a mandated supervision requirement for some felons released from prison. A U.S. Department of Justice study of over 5,000 medium- and high-risk offenders in Florida found electronic monitoring reduced offenders’ risk of failure by 31 percent.¹ In a National Institute of Justice study of high-risk sex offenders in California, those placed on electronic monitoring had 38 percent lower recidivism rate.² However, monitoring systems can also make it more difficult for offenders to obtain and keep a job. In the Florida study, 22 percent of offenders said they had been fired or asked to leave a job because of electronic monitoring. Electronic monitoring was not found to deter offenders from finding housing.³ Electronic monitoring will be most effective when it is used to support supervision that limits a person’s access to chances to commit crime. Such supervision should help offenders lead productive lives by helping them redesign their routines so that any risky settings are avoided and are replaced with more positive influences.⁴

PERFORMANCE IMPLICATIONS

In analysis submitted on HB5, AOC notes the bill does not mention data collection over time to study the impact on public safety when electronic location monitoring is used for pretrial defendants. The agency suggests such a study would provide additional information and data to determine if the use of electronic location monitoring impacts overall public safety. SB225 would similarly not require any study of the impact of electronic monitoring.

AOC also notes SB225 contains an emergency clause but some agencies may need to develop new processes, shift staff resources and develop information sharing policies to comply.

¹ U.S. Department of Justice, Office of Justice Programs, (September, 2011). *Electronic Monitoring Reduces Recidivism*. National Institute of Justice: Washington, D.C. Available: <https://www.ojp.gov/pdffiles1/nij/234460.pdf>.

² National Institute of Justice. (February, 2013). Sex Offenders Monitored by GPS Found to Commit Fewer Crimes. National Institute of Justice Journal. Available: <https://nij.ojp.gov/topics/articles/sex-offenders-monitored-gps-found-commit-fewer-crimes>.

³ U.S. Department of Justice, Office of Justice Programs, (September, 2011). *Electronic Monitoring Reduces Recidivism*. National Institute of Justice: Washington, D.C. Available: <https://www.ojp.gov/pdffiles1/nij/234460.pdf>.

⁴ Crime & Justice Institute. (2004). Implementing Evidence-Based Practice in Community Corrections: The Principles of Effective Intervention. Available: <https://s3.amazonaws.com/static.nicic.gov/Library/019342.pdf>.

RELATIONSHIP

SB225 conflicts with HB5, which defines a different set of circumstances under which public entities conducting electronic monitoring on pretrial defendants must share location data on those defendants with law enforcement and other entities.

SB225 relates to House Joint Resolution 4, House Bill 27, Senate Bill 156, and Senate Bill 189, all of which make changes to the current pretrial release practices.

TECHNICAL ISSUES

SB225 requires entities conducting electronic monitoring to provide law enforcement with “immediate” access to data when it is requested as part of investigations into certain violent crimes. “Immediate” is not defined, which could lead to differing interpretations. It may be desirable to specify a timeframe for this reporting and to ensure the entities responsible for fulfilling the requests have the capacity to respond within that timeframe.

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