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## FISCAL IMPACT REPORT

<b>SPONSOR</b> <u>Cervantes</u>	<b>LAST UPDATED</b> <u>3/17/2023</u>
<b>SHORT TITLE</b> <u>Attorney General Civil Rights Division</u>	<b>ORIGINAL DATE</b> <u>3/1/2023</u>
	<b>BILL NUMBER</b> <u>Senate Bill 426/aSJC/aHJC</u>
	<b>ANALYST</b> <u>Gray</u>

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

	FY23	FY24	FY25	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
NMAG personnel	No fiscal impact	\$330.0	\$1,650.0	\$1,980.0	Recurring	General Fund
NMAG office space	No fiscal impact	\$52.7	\$52.7	\$105.4	Recurring	General Fund
<b>Total</b>		<b>\$382.7</b>	<b>\$1,702.7</b>	<b>\$2,085.4</b>		

Parentheses ( ) indicate expenditure decreases.  
 \*Amounts reflect most recent analysis of this legislation.

Relates to appropriation in the General Appropriation Act

### Sources of Information

LFC Files

#### Responses Received From

New Mexico Attorney General (NMAG)  
 Workforce Solutions Department (WSD)  
 General Services Department (GSD)  
 Children, Youth & Families Department (CYFD)  
 Department of Public Safety (DPS)

## SUMMARY

### Synopsis of HJC Amendment to Senate Bill 426

The House Judiciary Committee Amendment to Senate Bill 426 provides a definition of person to be someone acting on behalf of or in the scope of a public body. The bill contemplates allowing the Office of the Attorney General (NMAG) to issue civil demands to a “person or public body,” and the amendment clarifies the scope of that provision.

### Synopsis of SJC Amendment to Senate Bill 426

The Senate Judiciary Committee Amendment to Senate Bill 426 clarifies language regarding confidentiality and provides that the Office of the Attorney General (NMAG) shall petition the district court for civil investigations.

Regarding confidentiality, the original version of SB426 provided that a person or entity under a civil investigation from the NMAG shall comply “notwithstanding” any confidentiality provisions. The amended version clarifies that a person or entity under a civil investigation from NMAG shall comply “regardless” of any confidentiality provisions. The two versions have the same effect but it is clearer in the amended version.

## Synopsis of Original Senate Bill 426

Senate Bill 426 contemplates creating a new civil rights division within the NMAG. The bill would authorize NMAG to investigate civil rights violations, bring civil actions for the violations, issue investigative demands, and collect information and make policy recommendations. The division would be staffed subject to legislative appropriations.

Statute currently protects civil rights through the Human Rights Act and the Civil Rights Act. Both acts generally rely on private enforcement. The Human Rights Commission’s has authority to encourage the elimination of prejudice through voluntary conciliation and persuasion conferences, but, aside from this, there is no official enforcement.

This bill does not contain an effective date and, as a result, would go into effect June 16, 2023, (90 days after the Legislature adjourns) if signed into law.

## FISCAL IMPLICATIONS

Analysis from NMAG noted the bill would require “an initial analysis or development plan” to determine how many staff would be required to fulfill the duties. The agency did not provide specific estimates.

**Personnel.** This analysis assumes the newly created civil rights division would be comparable in size to the agency’s open government division, which provides representation to government entities, drafts opinions, and promotes transparency. NMAG spends about \$1.5 million in personnel costs for the 14 FTE in the open government division.

It is assumed the civil rights division would require about 10 percent more personnel to operate a civil rights division for a total personnel cost of about \$1.65 million. This would amount to 15 staff, with 13 attorneys and two core staff. These costs would be recurring.

In addition to personnel, a new division would require office space, a recurring expense. A 2022 LFC program evaluation estimates the cost per square foot of office space to be between \$5 and \$19 depending if the space is state-owned or state-leased. Based on that and the recommended square feet per FTE, it is estimated the recurring office space costs are \$52.7 thousand.

**Current appropriation.** House Bill 2 grows the NMAG budget by 14.7 percent over FY23 across all revenue sources. The majority of the increase is for 23 new FTE, most of which are created in the civil litigation/consumer protection division. At the time of its budget submission, NMAG had a funded vacancies equivalent to approximately \$5 million.

Considered together, the NMAG’s high funded vacancy, significant appropriation for personnel in HB2, and persistent issues with hiring statewide make it unlikely that NMAG will be able to hire sufficient staff to fill the newly created civil rights division quickly. Implementation of SB426 will take place over FY24 and into FY25.

Accordingly, this analysis assumes there will be an operating budget in FY24 of 20 percent of the total costs. The full impact will be felt in FY25 and in subsequent fiscal years.

## SIGNIFICANT ISSUES

Currently, the Human Rights Commission has the ability to “seek” the elimination of discrimination through “conciliation and persuasion” through voluntary actions by the parties.

NMAG analysis notes:

Aside from the Human Rights Commission’s authority to “encourage” the elimination of prejudice, NMSA 1978, § 28-1-4(B)(4) (1987), New Mexico law does not presently provide any official enforcement authority for the protection of civil rights independent of private actions. Other states, by contrast, authorize their attorneys general to take proactive measures to protect civil rights. *See, e.g.*, Cal. Civ. Code § 52.3 (2001); Colo. Rev. Stat. Ann. § 24-31-113 (2021); Conn. Gen. Stat. Ann. § 3-129g (2021). The California Attorney General, for example, maintains a Civil Rights Enforcement Section with broad authority to enforce federal and state civil rights laws, <https://oag.ca.gov/civil>. As in these other jurisdictions, this bill’s enforcement authority would help protect civil rights in New Mexico.

Analysis from the Workforce Solutions Department (WSD) notes that SB426 may “overlap, infringe upon, or impede existing jurisdiction and prosecutorial discretion which state and federal government agencies already exercise regarding civil rights matters,” particularly as they relate to WSD’s Human Rights Bureau (HRB) and Labor Relations Division (LRD). The agency also notes potential conflict with the federal Equal Employment Opportunity Commission (EEOC).

The analysis continues:

SB426 is silent largely as to what relief or remedy the NMAG may seek when engaging the courts to intervene regarding civil rights violations. SB426 does not prescribe expressly that the NMAG may seek money damages or may seek only injunctive or declaratory relief. It will be important for WSD, the EEOC and the public to understand whether and to what extent any NMAG intervention may affect an individual’s or group’s attempt to seek redress through existing agency authority or the courts

WSD analysis also notes that SB426 may, intentionally or not, have a “preclusive effect” that stops private individuals or groups from seeking relief or remedy, because it is unclear whether the bill requires the NMAG to always join individuals or groups in civil rights actions.

Analysis from the General Services Department (GSD) notes that some provisions of SB426 may impact HSD’s risk management division (RMD). GSD analysis notes that it is unclear whether RMD would be required to provide counsel to a person or entity that is subject to an NMAG civil rights investigation.

Analysis from the Children, Youth & Families Department (CYFD) writes:

It is likely that the number of court actions filed for access to confidential CYFD records will increase. This bill grants the new civil rights division with the authority to request records and information regardless of their confidentiality, and it is unclear whether the bill entitles the division to receive confidential records, or how the confidentiality of those records will be protected from potential secondary disclosure, as the bill appears to

establish a different and more permissive standard for the release of information than confidentiality statutes governing CYFD’s records (e.g., 32A-4-33, 32A-2-32, 32A-2-26, 32A-6A-24, etc.).

CYFD also notes that, due to the nature of its work, the agency is often the target of civil rights violation allegations, and the bill may impact administrative performance and costs. There are likely many other state agencies which are often the target of civil rights violation allegations which may impact administrative performance and costs.

## TECHNICAL ISSUES

GSD analysis notes:

Subsection I provides that:

In the case of any conflict of interest between the attorney general's duties under this section and the attorney general's duty to represent *an entity* pursuant to Section 8-5-2 NMSA 1978, *the entity* shall be entitled to alternative representation by special counsel or as determined by the risk management division of the general services department.

The Attorney General has a duty to “prosecute and defend all actions and proceedings brought by or against any *state officer or head of a state department, board or commission, or any employee* of the state in his official capacity....” (Section 8-5-2(C) NMSA 1978).

The Attorney General’s duty to defend clearly extends to “persons”, but on its face, Subsection I of the bill (p.4, ll. 15-24) provides conflict representation only to an “entity”. The Legislature “is presumed not to have used any surplus words in a statute; each word must be given meaning.” *Baker v. Hedstrom*, 2013-NMSC-043, ¶ 24, 309 P.3d 1047 (internal quotation marks and citation omitted).

Assuming Subsection I is intended to apply to a “person,” it may be prudent to amend Section I to include “person.”

BG/al/ne