LFC Requester:	Sanchez

AGENCY BILL ANALYSIS - 2025 REGULAR SESSION

WITHIN 24 HOURS OF BILL POSTING, UPLOAD ANALYSIS TO
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(Analysis must be uploaded as a PDF)

SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Date Prepared: February 13, 2025 *Check all that apply:*
Bill Number: SB 309 Original *X* Correction __
Amendment __ Substitute __

Sponsor: Sen. Maestas
Short Title: Pretrial Release Notifications & Data

Agency Name and Code Number: AOC 218
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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY25	FY26		

(Parenthesis ( ) indicate expenditure decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY25	FY26	FY27		

(Parenthesis ( ) indicate revenue decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY25	FY26	FY27	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis ( ) Indicate Expenditure Decreases)

SECTION III: NARRATIVE

BILL SUMMARY

SB309 proposes a new statutory provision stating that pretrial release and supervision records "that show or support a violation of conditions of release" are public records except to the extent they include geographical coordinates, protected health information, or protected personal identifying information "or that the information be redacted."

Regarding release of global positioning (GPS) data to a law enforcement officer, SB309 amends current law to require only a "request" for the data, eliminating the requirement for "reasonable suspicion to believe the data will be probative." SB309 also eliminates the requirement that the data be not more than one year old and removes the limitation that such data "shall not be made a part of any public record unless admitted as evidence during a criminal trial."

SB309 leaves in place the restrictions that the law enforcement officer only has "immediate access" to GPS records relating to investigation of certain enumerated violent felonies, or a felony in which a firearm was "brandished" or discharged, or a felony offense during which great bodily harm or death was inflicted.

SB309 also creates a new statutory provision that requires, for any person on pretrial release "for a criminal offense" who "violates a condition of release" there be immediate notice by pretrial services to the court, the prosecuting authority, the defendant's counsel and the victim.

FISCAL IMPLICATIONS

SB309 broadens the scope of pretrial supervision records available to the public, expands the time period and nature of records available to law enforcement during investigation of a crime and before any charge is filed, and imposes substantial new production of records and reporting requirements by court personnel during the pretrial period. The duty to produce public records and to report pretrial events will require additional personnel to accomplish mandatory tasks for which AOC and the courts do not now have dedicated personnel. AOC will be required to revise the pretrial services manual and SOPs and train personnel in the new requirements. The requirement for court personnel to notify crime "victims" will require new data collection for such persons.

SIGNIFICANT ISSUES

Definitions of Terms

The new provision in SB309 that makes public records of "[p]retrial release and supervision records that show or support a violation of conditions of release" does not define those terms. To start, violation of the "conditions of release" (COR) is a judicial determination, not one made by pretrial services personnel. SB309 may intend to refer to records that *might* support a finding of a violation of a COR as determined by pretrial services personnel, a non-judicial assessment that would be difficult for court personnel to make. A defendant required to attend school may be absent one day but the pretrial services officer determines the defendant had a documented illness and returns to school when recovered. A defendant whose COR prohibits him or her from

being within 1,000 feet of a school may in fact do so because his/her public bus detoured around a traffic accident. A defendant whose phone fails may miss a telephonic appointment with the pretrial services officer, but soon makes contact to explain the problem and make alternate arrangements to satisfy that COR There are thousands of such interactions each year between pretrial services personnel and defendants that "might show or support" a COR violation.

In contrast to the difficult, non-judicial determination that a record might support a COR violation, it would be easy to determine that records "show or support a violation of conditions of release" when the defendant's alleged conduct is reported to the assigned judge for consideration as a violation of the COR. If SB309 is clarified to express an intent only to make these records "public records" it would be much less difficult to determine what is a public record subject to disclosure.

The scope of the duties imposed by SB309 on pretrial services personnel is also unclear. In particular, SB309 appears to could be interpreted to require the courts to redact thousands of ecords to remove the protected data recognized in the bill ("precise geographical coordinates, protected health information or protected personal identifying information"). The proposed language makes pretrial records not public records "provided . . . that the information be redacted." Instead of editing such records, does SB309 intend pretrial personnel to routinely deny public records requests if the defendant's file contains such information? Or does SB309 tend to make "public records" subject to disclosure only those that relate to a referral for judicial attention if the protected data can be redacted? In light of privacy concerns for defendants charged but not convicted of any crime, balanced with the public's interest in records that relate to alleged or actual violations of the COR that may threaten public safety, a limitation making public records only of alleged conduct that is referred to the judge for consideration may be appropriate.

With regard to the type of COR violations that are referred to the judge, new court rules require that any time a defendant on pretrial release is arrested and charged with a new felony or new enumerated misdemeanor defined in Rule 5-403.1 NMRA that is alleged to have occurred during the period of initial release the defendant "shall be held without conditions of release pending an initial hearing" before the judge who ordered pretrial release. In addition, AOC will refer to the judge any reported conduct that is a "non-technical violation" meaning "an act or omission by the defendant that is a willful violation of a condition of release that causes or presents a risk of harm to themselves or others. Non-technical violations are reported to the court and parties with a request for hearing or bench warrant. Judges retain discretion as to the issuance of a bench warrant. A Judge shall either hold a hearing or file an order stating why a hearing is not necessary and consider revocation or modification of a defendant's conditions of release." *Violation of Conditions of Release,* posted on the AOC pretrial website at https://pretrial.nmcourts.gov/wp-content/uploads/sites/57/2024/05/Violation-of-Conditions-of-Release-Defninitions.pdf.

In addition to the mandatory hearings and the general description of non-technical violations that will be referred to the judge, there is a list of reported violations that must be reported to the judge. These are: new misdemeanor or felony charge; failure to comply with a domestic violence order of protection; verified contact with alleged victim or witness on the case; verified return to the location of the alleged incident; failure to report to PTS [pretrial services] and unable to locate; GPS dead battery or unable to track defendant; verified curfew violation; leaving the State or County without permission; refusal to provide or falsifying a drug screen;

positive drug or alcohol screen (3rd or subsequent); missed random drug or alcohol screen (3rd or subsequent). *Violation of Conditions of Release, id.*

The extensive list of activities by a defendant that will result in referral of an alleged violation of COR to the judge may address the concerns behind the proposal in SB309 to make pretrial services records "public records." If this proposal in SB309 is adopted it may be sufficient to limit "public records" to activities that are referred to the judge as a possible violation of COR.

Section 3 of SB309 proposes new language requiring pretrial services to "immediately notify the court, the prosecuting authority, the defendant's counsel and the victim" when a person on pretrial release "violates a condition of release established by the court" "Immediately" means instantly, which may be impossible,. Consideration of a term that may allow actual compliance might be considered, such as "promptly" or within a given time period such as four hours. Notifying the court, prosecutor, and judge should occur quickly, but the court may not actively maintain contact with a victim, making notice very challenging. This duty may more appropriately rest on the prosecutor. More challenging is the issue of how pretrial services personnel know the defendant has committed a violation of the COR. Clarity would result if this provision depended on a judicial finding that a COR had been violated to trigger the required notices.

Broadening Access to Pretrial Records and to GPS Data

A provision in HB68 enacted during the 2022 legislative session (the current NMSA 1978, Section 31-3-28 (2022)) included access to GPS data by a law enforcement officer under certain conditions with the explicit limitation that the "data shall not be made a part of any public record unless admitted as evidence during a criminal trial." This provision was added at page 37 in the 71-page Senate Finance Committee substitute for HB68. The restriction on public disclosure unless the data was used at a public trial followed substantial discussion of the appropriate balance between the rights of those charged but not convicted of a crime to be free from unreasonable searches and seizures as well as their right to privacy against interests of law enforcement and the public in data that might advance public safety. On August 15, 2022, the New Mexico Supreme Court issued a 9-page order providing the process for law enforcement to obtain pretrial GPS data that is not now subject to public disclosure unless introduced at trial.

AOC published a 7-page "Global Positioning System (GPS) Data Sharing Procedure" for AOC and court personnel to follow to comply with police requests for GPS records for defendants on electronic monitoring. The procedure included a simple form for use by law enforcement officers to request such records. The procedure included providing GPS records as required by the Supreme Court's order pursuant to: an arrest warrant; when there is an immediate or credible threat of physical harm to the public; pursuant to a subpoena, a judicial order, or a search warrant; by stipulated protective order; or in compliance with NMSA 1978, Section 31-3-28 (2022) "[p]ursuant to an ongoing and pending criminal investigation for which there is reasonable suspicion to believe the data will be probative, provided that the data is not more than one year old" and "provided that the data involves investigation of" the several dozen types of charges listed in the statute. SB309 eliminates the requirement of reasonable suspicion and instead requires disclosure of GPS data to the police "upon request." Reasonable suspicion is a much more lenient standard than probable cause and is some deterrent on mere curiosity that could require disclosure of GPS records under an "upon request" standard.

The Supreme Court order and the AOC Procedure are too lengthy to be attached here. Both will be provided in print or electronically to any Legislator upon a request made to the AOC. Both the one-year limitation and the limits on public disclosure in the current statute and Supreme Court order may be intended to balance privacy interests with public interest in the information. As the Supreme Court order states in section II.B on pages 4-5; "As a general rule, PTS [pretrial services] Records are confidential. Under certain circumstances, GPS data may be disclosed to certain individuals or entities. The following sections explain under what circumstances GPS data may be disclosed. GPS Records shall only be disclosed to law enforcement as provided in this Order. GPS Records shall not be provided prior to trial to any other individual or entity."

Consideration of the way release of pretrial records, including but not limited to GPS records, affect the privacy interests of unconvicted and presumed innocent defendants arises from the Fourth Amendment protection of an individual's reasonable expectation of privacy which is mirrored in New Mexico Constitution, Article II, Section 10. The New Mexico Supreme Court has not yet ruled precisely on the limits, if any, that these constitutional provisions place on distribution of pretrial services information, pretrial GPS data, or even on the constitutionality of the existing statue in Section 31-3-28. However there are many cases that may inform the Legislature's consideration of SB309.

In *United States v. Jones*, 565 U.S. 400, 405 (2012), the United States Supreme Court reversed the defendant's drug trafficking conviction because police obtained some evidence used to convict through a GPS tracking device attached to his car without a search warrant, with five Justices agreeing that "longer term GPS monitoring . . . impinges on expectations of privacy." See *id.* at 430 (Alito, J., concurring); *id*. at 415 (Sotomayor, J., concurring). Location data "provides an intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations.'" *Carpenter v. United States*, 585 U.S. 296, 311 (2018) (*quoting Jones*, 565 U.S. at 415 (Sotomayor, J., concurring)). *See also United States v. Diggs*, 385 F. Supp. 3d 648, 652 (N.D. Ill. 2019) (long-term, historical vehicle GPS data "fits squarely within the scope of the reasonable expectation of privacy identified by the *Jones* concurrences and reaffirmed in *Carpenter*"); *People v. Weaver*, 909 N.E.2d 1195, 1199–1200 (2009) (GPS data provides "with breathtaking quality and quantity" a "highly detailed profile, not simply of where we go, but by easy inference, of our associations—political, religious, amicable and amorous, to name only a few—and of the pattern of our professional and avocational pursuits."); *State v. Jackson*, 76 P.3d 217, 224 (Wash. 2003) ("use of GPS tracking devices is a particularly intrusive method of surveillance, making it possible to acquire an enormous amount of personal information").

Data shows that in New Mexico few GPS records result in serious violations of COR. "From October 2023 through September 2024, the EMS [Electronic Monitoring and Supervision] Unit has investigated approximately 245,000 alerts with 3,250 elevated investigatory responses resulting in 201 bench warrant requests." *2024 Annual Report, AOC Pretrial Justice Program,* p. 16, found at; https://pretrial.nmcourts.gov/wp-content/uploads/sites/57/2025/01/Pretrial-Justice-Program-Annual-Report-2024.pdf. Thus 1.3% of all potential violations qualified as being of elevated concern with ultimately less than 1% (0.082%) resulting in a bench warrant. Given the legal landscape regarding invasion of privacy concerns with disclosure of GPS data and the fact that those on pretrial release are defendants charged with a crime and not convicted, this data may be relevant to the proposals in SB309 to broaden public access to pretrial records and access to GPS data.

PERFORMANCE IMPLICATIONS

The numerous new duties imposed by SB309 on AOC and court pretrial services will require additional personnel, especially as written to greatly expand the qualification of pretrial services records as public documents, expanded access to records and GPS data, and new notice requirements.

ADMINISTRATIVE IMPLICATIONS

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

TECHNICAL ISSUES

OTHER SUBSTANTIVE ISSUES

ALTERNATIVES

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

AOC and courts will continue to comply with the current version of the statute, providing law enforcement access to GPS data and treating as public records any information used in court.