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## FISCAL IMPACT REPORT

ORIGINAL DATE 2-8-09  
 SPONSOR Cervantes LAST UPDATED 3-11-09 HB 600/aHCPAC  
 SHORT TITLE Public Records Inspection Violations SB \_\_\_\_\_  
 ANALYST Ortiz

### APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY09	FY10		
NFI	NFI		

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to HB103, HB507, HB534 and HB598

### REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Non-Rec	Fund Affected
FY09	FY10	FY11		
	\$0-\$2.5*	\$0-\$2.5*	Recurring	General Fund

(Parenthesis ( ) Indicate Revenue Decreases)

\*See fiscal impact.

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Administrative Office of the Courts (AOC)  
 Attorney General's Office (AGO)  
 Taxation and Revenue Department (TRD)  
 Public Education Department (PED)

### SUMMARY

#### Synopsis of HCPAC Amendment

The House Consumer and Public Affairs Committee amendment to House Bill 600 adds an affirmative defense to the violation of the Inspection of Public Records Act (IPRA). It is a defense to prosecution if a public official refuses to disclose records "in good faith" and "based on a reasonable belief" that the law requires nondisclosure.

Synopsis of Original Bill

House Bill 600 amends the Inspection of Public Records Act (“IPRA”) by adding a criminal penalty. It provides that a person who knowingly and willfully withholds public records subject to inspection is guilty of a misdemeanor punishable by a fine of not more than \$500 for each offense. \*The estimated revenue in the table above is based on the possibility of 5 fines of \$500.

**FISCAL IMPLICATIONS**

Imposing a fine of not more than \$500 for willfully withholding public records will have a permanent positive impact on revenues. The Taxation and Revenue Department has no information regarding the number of such misdemeanors and hence cannot provide a fiscal impact

**SIGNIFICANT ISSUES**

The amendment to the bill addresses the AOC’s concern about a public servant trying to deal with the increasingly complex area of confidentiality. In any given circumstance, there may be reasonable disagreement about whether state or federal confidentiality requirements with health, personnel and educational records prevent disclosure. This amendment will allow a public official responding to a records request to take a reasoned position against disclosure without worrying about prosecution.

Even with this amendment, PED contends that a person seeking to deny a records request would be placed in a position of having to be able to demonstrate some affirmative act on which to base a reasonable belief that a requested record was not subject to inspection under the IPRA. It would seem that a lawyer would be involved in almost every IPRA request to avoid the potential for criminal prosecution.

According to the Attorney General’s Office, the knowing and willful threshold for finding a criminal violation may be difficult to prove, but may be necessary to avoid penalizing people who deny access to records based on a good faith belief that the records are not public. The bill is beneficial because it provides another means of enforcing IPRA. Currently, enforcement is limited to a civil action in district court brought by the Attorney General, a district attorney or a person whose inspection request has been denied. The addition of the criminal penalty may also provide an additional incentive to public bodies for complying with IPRA. In contrast to IPRA, the Open Meetings Act has a criminal penalty provision, which has been in effect since 1974.

**ADMINISTRATIVE IMPLICATION**

PED notes that this bill could lengthen the time needed to respond to requests under the IPRA because state agencies, particularly records custodians, would have to obtain legal opinions each time they determined that a requested record should be withheld.

**RELATIONSHIP**

- HB 103 is related in that it provides for certain new exceptions to IPRA related to security.

- HB 507 is related in that it provides for a maximum of 15 days to disclose records under IPRA, regardless of how burdensome the request may be and allows for electronically transmitted record requests.
- HB 534 allows parties on both sides of an IPRA request to communicate through electronic means, including electronic disclosure of records.
- HB 598 similarly allows for electronically transferred requests.

### **ALTERNATIVES**

Administrative Office of the Courts suggests changing the threshold for criminalization from knowing and willful refusal to disclose to “bad faith” refusal to disclose. A bad faith refusal will necessarily be a willful refusal. However, in addition, the refusal will have to be proven to be without reasonable legal excuse.

EO/mt