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## FISCAL IMPACT REPORT

**SPONSOR** Sanchez, M. **ORIGINAL DATE** 01/20/12  
**LAST UPDATED** 02/10/12 **HB** \_\_\_\_\_

**SHORT TITLE** Criminal Record Expungement Act **SB** 2

**ANALYST** Wilson

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

	FY12	FY13	FY14	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>		\$140.0*	\$140.0*	\$420.0*	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

\*DPS provided this estimate, but they cautioned that the cost might be higher.

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Administrative Office of the District Attorneys (AODA)

Administrative Office of the Courts (AOC)

Attorney General's Office (AGO)

Department of Public Safety (DPS)

Public Defender Department (PDD)

Sentencing Commission (SC)

### SUMMARY

#### Synopsis of Bill

Senate Bill 2 enacts the Criminal Record Expungement Act (Act), codifying the practice for courts to expunge an individual's criminal record in specified circumstances.

The bill sets out the definitions that will be used in the criminal record Act: arrest records, expunge, and public records. This section also sets out information that is not included under public records. Expunge means to remove from access to the general public notation of an arrest, complaint, indictment, information, proceeding, plea conviction, acquittal, reversal, dismissal or discharge.

The bill sets out procedures for expungement of records when there has been an identity theft or a wrongful arrest, indictment or charge. The person must petition the district court. After a hearing where the person shows that he is a victim of identity theft or was wrongfully arrested, indicted or charged, the court shall issue an order within thirty days requiring all arrest records

and public records be expunged. The court shall deliver a copy of the order to all relevant law enforcement agencies. The order shall prohibit law enforcement agencies and courts from releasing copies of such records except upon order of the court.

The bill provides for expungement of records upon release without a conviction. The person who was released without conviction for a violation of a municipal ordinance, misdemeanor or felony, may petition the district court. The court shall order expungement of public records and arrest records within 30 days of a petition for expungement if it finds that no other charge or proceeding is pending against the accused and if the person was released without a conviction, including:

- an acquittal or finding of not guilty;
- a *nolle prosequi*, a no bill or a dismissal other than a Section 31-20-9 NMSA dismissal;
- successful completion of a pre-prosecution diversion program; or
- the proceedings were otherwise discharged.

The bill further provides for expungement of records after conviction. The accused who was convicted after no more than one incident of a misdemeanor or violation of municipal ordinance, but has no other conviction after completion of the sentence for the original conviction may petition the court. The court shall order expungement of public records and arrest records within 30 days of the hearing if it finds that no other charge or proceeding is pending against the accused and that justice will be served by an order to expunge if:

- (1) no other charge or proceeding has occurred for a period of five years if the conviction was for a misdemeanor; or
- (2) no other charge or proceeding has occurred for a period of ten years if the conviction was for an offense involving domestic violence or abuse.

The court shall deliver a copy of the order to all relevant law enforcement agencies and courts. The order shall prohibit the release of the records except upon an order of the court. The time for calculating eligibility for expungement begins the day a person's sentence, including probation, is completed. Expungement under this section does not apply to a crime committed against minors or children, a sex offense or an offense involving driving while under the influence of intoxicating liquor or drugs.

Upon entry of an expungement order, the proceedings shall be treated as if they never occurred and officials and the accused may reply to an inquiry that no record exists with respect to the accused.

Nothing in the Act shall be construed to prohibit a law enforcement agency from maintaining and using criminal history information for any purpose.

## **FISCAL IMPLICATIONS**

The impact of this bill could be overwhelming to DPS both financially and administratively. DPS maintains records in excess of 592,000 that would be subject to requests for expungement under this bill. If every individual chose to have their record expunged, the cost would be in excess of \$19,000,000. This estimate is based upon DPS Records Bureau experience. In the last two years DPS has received 216 expungement requests under 29-3-8.1 and court orders. An average expungement of arrest records takes three staff a total of 1.5 hours per record at a cost of \$33 per record.

For every 1000 cases that come in it will cost approximately \$33,000 in personal services costs. Hiring three full-time FTEs to handle the additional expungement requests would cost \$140,000 and provide the capacity to handle approximately 4,000 records expungement request per year. Clearly, if the volume of requests is higher than 4,000 per year, a backlog would result or additional FTE would be required.

In addition to the costs mentioned above, the DPS is required to undertake, with the Administrative Office of the Courts, a rulemaking procedure and it is expected that this process and the enforcement of the intended rules will have an additional significant fiscal impact.

There will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to the enforcement of this law and the number of petitions filed. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase. AOC is currently working on possible parameters to measure resulting impact on case filings.

### **SIGNIFICANT ISSUES**

The AODA notes that in 2011 the New Mexico Supreme Court rejected a similar proposal after extensive investigation and public comment apparently on the grounds that the public's right to know outweighed any potential prejudice to a defendant.

The AODA further states that this bill does not address the consequences of an inadvertent disclosure of information that should have been expunged.

The PDD notes that the identity theft statute NMSA 1978, § 30-241.1 grants the trial court authority to issue orders as are necessary to correct public records and errors in credit reports and identifying information that contain false information as a result of the theft of identity or of obtaining identity by electronic fraud. While it does not name expungement, it would be covered by this provision.

DPS provided the following:

The most significant issues presented by passage of the proposed legislation is that it provides for the expungement of arrests without a conviction, contrary to current law, and the ability to expunge convictions, not based on a wrongful arrest or identity theft. These are found at sections four, expungement of records after release without conviction, and at section five, expungement of records after conviction. Expungement of records could be administratively overwhelming. The total number of criminal misdemeanor records and felony records without disposition affected by the bill would be approximately 592,000.

Additionally, the bill as written may preclude federal law enforcement entities including those agencies under the Department of Justice and the Federal Department of Homeland Security, from accessing records that they currently have access to. Since the State controls what information would be entered into NCIC, federal entities would no longer have this information without coming directly to the State of New Mexico. This appears contrary to the stated purpose of section eight of the proposed legislation. Further, this

presents an officer safety issue for all law enforcement officers nationwide who will be deprived of this information and thus at risk. This may also pose a constitutional issue.

The increasing need for educating the public on an individual's criminal history is evident in the continuous passing of fingerprint based on criminal history screening statutes and federal laws. DPS has a duty to educate the public of possible harm and not withhold information that could possibly protect a vulnerable community member.

This bill changes the entire structure of the state's criminal records repository function. By expunging these records where a final disposition exists but is not coupled with a conviction, the public will now be unable to garner information related to an individual's arrest. It should be noted that this information is currently public and that by expunging this information it appears to work as a counterpoint to the State's Inspection of Public Records Act which provides that these records are public, presumably to allow the public to ascertain and access the credibility and function of government.

### **ADMINISTRATIVE IMPLICATIONS**

The bill requires the AOC and the DPS to develop rules and procedures to implement the Act, including procedures for notifying the accused of his or her rights under the Act.

DPS claims they will need at least three new FTEs

### **TECHNICAL ISSUES**

The AOC and the AODA suggest defining identity theft and wrongful arrest.

### **OTHER SUBSTANTIVE ISSUES**

The AOC suggests an expansive definition of law enforcement would be helpful. They note that law enforcement includes municipal, county, state, tribal, and federal agencies with the authority and responsibility to maintain records involving arrests, convictions and other information critical to law enforcement.

### **ALTERNATIVES**

The AOC suggests that it might be better to have DPS notify all relevant law enforcement agencies and the NCIC of record expungements since DPS is the keeper of the official criminal history records.

DW/svb