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FISCAL IMPACT REPORT

ORIGINAL DATE
SPONSOR Chasey **LAST UPDATED** 02/23/15 **HB** 363

SHORT TITLE No Tort Immunity for Officers & Body Cameras **SB** _____

ANALYST Daly

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		Possibly Significant	Possibly Significant	Possibly Significant	Recurring	General Fund and Local Government Funds

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Department of Public Safety (DPS)
 Administrative Office of the Courts (AOC)
 Administrative Office of the District Attorneys (AODA)
 Attorney General’s Office (AGO)

SUMMARY

Synopsis of Bill

House Bill 363 adds a second waiver of immunity under the Tort Claims Act for claims against law enforcement officers for personal injury, bodily injury, wrongful death or property damage if the officer failed to use a body camera in compliance with applicable policies of the officer’s agency. “Body camera” means video equipment attached to the officer that allows visual and audio recording of events that can be preserved in an electronic digital format.

FISCAL IMPLICATIONS

DPS advises there will be some, possibly significant, fiscal implications associated with increased litigation. Any such increase would impact other agencies as well, including the courts. It also may lead to increases in premiums charged by Risk Management Division of the General Services Department for law enforcement under its public liability program.

SIGNIFICANT ISSUES

AGO explains the current status of tort immunity for law enforcement officers, including the existing waiver:

Generally, the Tort Claims Act provides immunity from tort suits to governmental entities and public employees acting in their official capacities unless the Act contains a specific waiver of that immunity. *Wachocki v. Bernalillo County Sheriff's Dept.*, 147 N.M. 720, 228 P.3d 504 (NMCA, 2009). Under current law, immunity is waived if a law enforcement officer commits an act of assault, battery, false imprisonment or false arrest; pursues a malicious prosecution; or commits abuse of process, libel, slander, defamation of character, or violates property rights or deprives a person of any rights, privileges or immunities (“enumerated acts”), and that action in turn causes personal injury, bodily injury, wrongful death or property damage. Law enforcement officers cannot be liable under this waiver of immunity for mere negligence that does not stem from one of the enumerated acts. *Blea v. City of Espanola*, 117 N.M. 217, 870 P.2d 755 (NMCA, 1994).

HB 363 adds a second waiver for personal or bodily injury, wrongful death or property damage caused by an officer who failed to use a body camera consistent with the policies of the officer’s agency. DPS first calls attention to the lack of causation in this new waiver, which causation is present in the existing one: that the injury, death or damage resulted from the improper actions of an officer in committing an assault, battery, or other enumerated acts (listed in Subsection A of the section of statute being amended). This approach, it contends:

is not consistent with legislative intent in waiving particular immunities under the Tort Claims Act. More specifically, it is inconsistent with waiving immunity for intentional conduct by officers who directly cause a person harm without justification. It is unclear how failure to record can cause personal injury or wrongful death. It is an officer’s unconstitutional or otherwise unlawful conduct that causes an injury, not the failure to activate a recording device.

Further, DPS comments:

While the bill only purports to waive immunity for failures to comply with policies, it is unclear who determines whether policy compliance was sufficient to preserve immunity. If an agency determines for a valid reason that there was not a failure of compliance even though an event was not recorded, it is unclear whether that determination will be enough to shield an officer or the officer’s agency from tort liability. The bill also fails to distinguish between inadvertent and willful failures to record (problematic on its face, but as previously discussed also inconsistent with legislative intent to waive law enforcement immunity only for intentional misconduct).

AGO raises other issues that arise in the context of this waiver based on an agency’s policies on body cameras. First, it advises the use of body cameras by law enforcement is not uniform throughout the state. Some municipalities, as well as the state police, rely on dashboard cameras to record their interactions with citizens. Some agencies, like the Bernalillo County Sheriff’s Office, rely on the use of belt tapes, which capture only audio interactions. This bill only impacts those agencies that use body cameras. Second, AGO provides this policy analysis for not relying on agency regulations as a basis for tort litigation:

One policy reason for excluding police regulations is that “treating administrative standards as evidence of a constitutional violation might deter police departments from adopting progressive standards, as many police departments use administrative measures such as reprimands, salary adjustments, and promotions to encourage a high standard of public service, in excess of the federal constitutional minima.” *Tanberg v. Sholtis*, 401 F.3d 1151, 1163 (10th Cir. 2005). Similarly, violation of police regulations was found to be an insufficient basis for a civil rights action for excessive force. See *Marquez v. City of Albuquerque*, 399 F.3d 1216 (10th Cir. 2005). With this in mind, the proposed legislation may result in police departments electing not to mandate the use of body cameras or promulgating procedures for the use of body cameras.

Similarly, AODA comments that because failure to use a body camera in accordance with agency policies now may make an officer subject to tort liability for damages and injuries resulting from lawful actions, agencies may be reluctant to impose strict requirements for use of body cameras.

Further, AODA advises that requiring an officer to use a body camera “at all times while on duty,” for instance, does not take into account any of the legitimate reasons an officer may have failed to use a body camera in a particular situation. AGO provides examples: there are reasons that may be crucial to officer safety for non-use of cameras, especially when discovery of a camera could cause death or great bodily harm to an undercover detective or that officer’s family, or compromise high level investigations to the detriment of the public.

DPS expresses concern that this new waiver may lead to more litigation and efforts at creating a new cause of action for failure to record, as well as being interpreted as expressing a legislative preference for body cameras, perhaps setting new standards for what constitutes reasonable conduct by law enforcement.

PERFORMANCE IMPLICATIONS

DPS suggests this bill may have a negative impact on the recruitment and retention of law enforcement officers, who may carry an additional risk of personal liability in performing their job duties.

MD/je/bb