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## FISCAL IMPACT REPORT

SPONSOR Sanchez, M ORIGINAL DATE 2/6/15  
LAST UPDATED \_\_\_\_\_ HB \_\_\_\_\_

SHORT TITLE Criminal Records Expungement Act SB 365

ANALYST A. Sánchez

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

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>		70.0	142.1	212.1	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates 2013 SB 294

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Administrative Office of the Courts (AOC)

Attorney General Office (AGO)

Public Defender Department (PDD)

New Mexico Sentencing Commission (NMSC)

### SUMMARY

#### Synopsis of Bill

Senate Bill 365 creates the Criminal Record Expungement Act, which would allow individuals who are victims of identity theft or who are wrongfully arrested, indicted or charged, to petition the district court for expungement of arrest records and public records. SB 365 requires the court to issue an order within 30 days of the hearing requiring that all arrest records and public records be expunged, upon a showing that a person is a victim of identity theft or was wrongfully arrested, indicted or charged.

Under SB 365, persons also may petition for expungement one year after dismissal or release without conviction of any alleged ordinance, misdemeanor, or felony violation. Under the bill, after a hearing on a petition, the court is required to issue an order within 30 days of the hearing requiring that all arrest records and public records be expunged if it finds that no other charge or proceeding is pending against the person 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 dismissal pursuant to Section 31-20-9 NMSA 1978, successful completion of a pre-prosecution

diversion program, or the proceedings were otherwise discharged.

SB 365 also permits a person who has been convicted of one or more misdemeanors or violations of a municipal ordinance arising out of one incident and who has had no other convictions after completion of the sentence to petition the district court for expungement. Under the Act, after a hearing on the petition, the court is required to issue an order within 30 days of the hearing requiring expungement of arrest records and public records if it finds that no other charge or proceeding is pending against the person, that justice will be served by an order to expunge and that no other charge or proceeding has occurred for 5 years if the conviction was for a misdemeanor, or that no other charge or proceeding has occurred for 10 years if the conviction was for an offense involving domestic violence or abuse. SB 365 provides that the time for calculating eligibility for expungement begins the day a person's sentence, including probation, is completed. SB 365 clarifies that these provisions do not apply to a crime committed against minors or children, a sex offense or an offense involving DWI.

SB 365 requires, in each instance where expungement is ordered, that the court deliver a copy of the order to all relevant law enforcement agencies and courts. The bill requires the order to prohibit all relevant law enforcement agencies and courts from releasing copies of such records to any person, except upon order of the court.

The bill places limitations on what is expunged, excluding the following from the definitions of "arrest records" and "public records": DWI citations maintained by the Taxation and Revenue Department; computer-aided dispatch information; log books relating to breath alcohol testing equipment; arrest record information that reveals confidential sources, methods, information or individuals accused but not charged with a crime, that is confidential and unlawful to disseminate or reveal, except as provided in the Arrest Record Information Act or other law, the file of a District Attorney or Attorney General maintained as a confidential record for law enforcement purposes and not open for inspection by members of the public, a record maintained by the Children, Youth and Families Department, the Human Services Department or the Public Education Department when that record is confidential under state or federal law and is required to be maintained by state or federal law for audit or other purposes, or a record received pursuant to a lawfully-authorized background check.

SB 365 provides that upon entry of an order to expunge, the proceedings shall be treated as if they never occurred, and officials and the person who received the order to expunge may reply to an inquiry that no record exists with respect to the person. The bill clarifies that the Act does not affect or otherwise infringe upon the expungement provisions of Section 29-3-8.1 NMSA 1978.

SB 365 requires AOC and DPS to develop rules and procedures to implement the Act, including procedures for notifying the accused of the accused's rights under that Act.

The bill provides that nothing in the Act shall be construed to prohibit a law enforcement agency from maintaining and using criminal history information for any lawful purpose.

The effective date of the proposed legislation is January 1, 2016.

## FISCAL IMPLICATIONS

AOC reports minimal administrative costs should the bill become law.

Although DPS did not respond to this bill, the response to SB294 in 2013 which is identical to SB 365, DPS reported that over two years it had received 216 expungement requests under Section 29-3-8.1 NMSA 1978 and court orders. On average an expungement of arrest records takes three staff a total of 1.5 hours per record at a cost of \$33 per record. DPS then anticipated it would have to hire up to three full-time staff to handle the additional expungement requests. The increased cost for salaries and benefits is approximately \$140 thousand and could handle up to 4,000 expungement requests.

The AOC indicates there will be unknown costs resulting from this bill and would be dependent on the number of petitions for expunging of records.

## SIGNIFICANT ISSUES

PDD reports that many other states have similar public-record expungement laws in place. Just this past Wednesday, the United States Court of Appeals for the Second Circuit decided *Martin v. Hearst*, \_\_\_ F.3d \_\_\_, 2015 WL347052 (Jan. 28, 2015), discussing the Connecticut “erasure” statute and holding news organizations are not required to take down news stories about arrests.

SB 365 clarifies and expands the inherent authority for courts to expunge criminal records that our appellate courts have found are recognized in most states. See *Toth v. Albuquerque Police Dept.*, 1997-NMCA-079, ¶¶ 5-6, 123 N.M. 637. It would allow expungement in certain situations that our appellate courts have declined to approve of in the recent past, presumably because our courts have preferred to avoid “legislating from the bench.” See *State v. C.L.*, 2010-NMCA-050, ¶ 15, 148 N.M. 837 (finding expungement unwarranted where the defendant was charged only as an accessory in the underlying crime, she had entered an *Alford* plea, she was granted a conditional discharge and was released early due to her compliance with the terms of release, she had been denied employment opportunities as a result of her criminal record, she had been industrious and continued her education, and she had no prior criminal record).

The NMSC states that section 8 of the bill states that nothing in the act shall be construed to prohibit a law enforcement agency from maintaining and using criminal history information for any lawful purpose. This provision may be particularly important for the prosecution of subsequent domestic violence offenses.

The AGO states that the bill provides relief for persons wrongfully arrested, or acquitted, dismissed without a conviction, and other instances of no conviction, to have all records pertaining to the criminal charges expunged from public records. It also provides relief from the growing problem of identity theft. In Section 5(E), the bill includes exceptions for crimes against minors or children, a sex offense and DWI. However, in Section 5 (B) (2), permits domestic violence offenders, after 10 years and no other charges or proceedings, to successfully petition for expungement.

Additionally, opponents argue that this bill prevents law enforcement from maintaining records and may be contrary to federal law. Also, expungement may be a safety issue for law enforcement officers who rely upon arrest records and other data maintained by law enforcement

to assess dangerousness or violent tendencies, and criminal records which are routinely used in determining the circumstances, such as modus operandi, in investigating new criminal offenses.

Moreover, sex offenses and domestic violence offenses are notorious for being difficult to investigate and prosecute. Law enforcement and prosecutors frequently use prior arrest and other criminal records to analyze cases. Expungement could hamper the investigation in some cases.

## **PERFORMANCE IMPLICATIONS**

The courts are participating in performance-based budgeting. This bill may have an impact on the measures of the district courts in the following areas:

- Cases disposed of as a percent of cases filed
- Percent change in case filings by case type

## **TECHNICAL ISSUES**

The AODA provided the following analysis regarding technical issues:

The bill would not allow someone to petition for an expungement for at least a year. Prior to that time presumably many of the records that the bill appears to target would be accessible to the general public and interested persons would have already obtained the information. Law enforcement agencies and others could have already disseminated it in a variety of methods.

The bill also states that a person released without conviction for a crime may petition the court for an order to expunge arrest records and public records “one year after dismissal or release.” Many persons are released from custody, by posting bail or other order of the court, but their case is not resolved for more than a year. Sometimes a person is arrested but they are not indicted or formally charged for some period of time while the investigation is continued and the bill might possibly mean that if they weren’t formally charged for a year all of the records pertaining to their initial arrest would be expunged.

The AOC points out that 1) there is no definition “wrongfully arrested, indicted or charged” and “sex offense.” The AGO agrees with AOC that both terms need to be defined.

The AGO suggests reconciling the Inspection of Public Records Act with the proposed expungement statute.

## **OTHER SUBSTANTIVE ISSUES**

The AGO points out that New Mexico has expungement statutes (or statutes and rules for sealing records), including but limited to;

- Arrest records, NMSA 29-3-8.1
- DNA, NMSA 29-16-10 and 10.1
- Conditional discharge for first time drug possession, NMSA 30-31-28(D)
- Children’s Code, 32A-3B-21(A)(1) and (2)
- Delinquency Proceedings, NMSA 32A-2-26
- Delinquency Proceedings, Rule 10-262, automatic sealing of records

Identity Theft, NMSA 31-26-16, expungement from police and court records  
Identity Theft, 30-16-24.1(I), correction of records  
District Court Rule 5-123, sealing records  
Grand Jury, NMSA 31-6-5, sealed no bills, Also NMSA 31-6-7, secret proceedings

According to NMSC, laws regarding expungement of criminal records vary by state. Of the forty states that allow expungement or sealing of arrest records not leading to conviction, twenty-nine states permit a person to deny the arrest. Of the sixteen states that allow expungement or sealing of convictions, thirteen permit an ex-offender to deny the conviction (Geiger 2006, Mukamal & Samuels 2003). State laws vary as to which conviction and arrest records can be expunged. A few states have very strict laws and rarely allow expungement of accurate arrest or conviction records, but most have expungement procedures that depend on the following factors:

- whether you were actually convicted of a crime
- if you were convicted, the severity of the crime
- how long it has been since you were arrested or convicted
- whether you have successfully completed the terms your sentence, probation, or diversion program, and
- whether you have been convicted of other crimes in the past.

No matter where you live, it is unlikely that you will be able expunge a very serious crime, such as a violent felony or a sex offense. (Criminal Defense Lawyer 2015).

Ten states (Iowa, Maine, Michigan, Montana, North Dakota, Nebraska, New Mexico, South Dakota, Vermont, and Wyoming) do not permit people to expunge or seal arrest records (Mukamal & Samuels 2006).

## **ALTERNATIVES**

The AGO provided the following list of possible amendments:

1. Clarify “sex offense”.
2. Define “wrongfully”. An acquittal does not mean that the defendant was “wrongfully” arrested or charged.
2. Reconcile IPRA requirements with proposed expungement statute.
3. Consider removing domestic violence incidents, misdemeanor and felony.

## **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

The PDD reports that under existing law, there is no automatic right for victims of identity theft and wrongful arrest, and the other classes of petitioners in the bill, to seek expungement from the courts. They are currently at the mercy of courts, who have no clear guidance on where it is appropriate to order expungement.