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## FISCAL IMPACT REPORT

SPONSOR Ortiz y Pino ORIGINAL DATE 02/02/17  
LAST UPDATED 02/09/17 HB \_\_\_\_\_

SHORT TITLE Freedom From Unwanted Surveillance Act SB 167/aSPAC

ANALYST Sánchez

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

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>		None	None	None		

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Administrative Office of the Courts (AOC)  
Department of Military Affairs (DMA)  
Attorney General's Office (AGO)  
Indian Affairs Department (IAD)  
Department of Public Safety (DPS)

### SUMMARY

#### Synopsis of SPAC Amendment

Senate Public Affairs Committee Amendment to Senate Bill 167 strikes "imminent" from the description of danger on page 3.

#### Synopsis of Bill

Senate Bill 167 proposes to create a new act which would prohibit a person, state agency, law enforcement agency or political subdivision of the state from conducting unwanted surveillance using unmanned aircraft or drones to collect evidence or other information on private property pertaining to criminal conduct or conduct in violation of state statute where the property owner has a reasonable expectation of privacy, except to the extent authorized in a warrant. The property owner must give permission to conduct surveillance absent a warrant. The bill does not prohibit the use by law enforcement under exigent circumstances. The bill provides for chain of custody of information collected using unmanned aircraft or drones. Information collected in violation of the act is not admissible in court and a person who violates the act is guilty of a petty misdemeanor

## SIGNIFICANT ISSUES

The Indian Affairs Department (IAD) considers this bill an infringement on tribal sovereignty and may also violate the State-Tribal Collaboration Act. The bill currently subjects tribal law enforcement agencies to proposed regulations and penalties for their use of drones for specifically defined, unwarranted purposes. States may not, however, exercise power within Indian country if such action would infringe upon the rights of Indians to make their own laws. Tribes have unlimited jurisdiction over members of their own tribe as limited by their own laws and the federally imposed Indian Civil Rights Act. This bill does not exempt tribal law enforcement agencies' conduct towards their own tribal members in Indian country. In short, to the extent this bill seeks to regulate tribal law enforcement agencies' activities towards members of their own community within Indian country, it will likely be federally preempted.

The Department of Military Affairs (DMA) believes that the bill would restrict the use of any drones it may use to help with search and rescue or counterdrug operations. Likewise, the Department of Homeland Security may want to use drones to counter a high risk terrorist attack. Other state agencies may want to use drones to capture images for utilities or mapping purposes. Section 4, only grants an “exigent circumstances” exception to “law enforcement agencies” but other agencies besides law enforcement may respond in an emergency.

The Department of Public Safety (DPS) reports that unmanned aircraft are becoming commonplace in law enforcement arenas because of cost savings and safety (no pilots in danger). While the bill makes an exception for “exigent circumstances” for the use of a drone when danger to life is imminent, the broad language of the bill may invite legal challenges.

The Administrative Office of the Courts (AOC) cites *State v. Davis*, NO. S-1-SC-34548 (2015), the New Mexico Supreme Court held that, under the facts presented, unwarranted aerial surveillance by a helicopter was an unwarranted search in violation of the Fourth Amendment of the U.S. Constitution. The court wrote “The prolonged hovering close enough to the ground to cause interference with Davis’ property transformed this surveillance from a lawful observation of an area left open to public view to an unconstitutional intrusion into Davis’ expectation of privacy.” *Id.* at p. 27. The Supreme Court noted that the Court of Appeals suggested that when considering privacy interests under the New Mexico Constitution the court move away from an analysis that weighs intrusion “in anticipation of future surveillance conducted by “ultra-quiet drones” and other high-tech devices. *Davis III*, 10 2014-NMCA-042, ¶ 19.” *Id.* at p. 28. The court noted further that, “Because this case only involves surveillance by helicopters, technology that has been with us for nearly 80 years, we find it unnecessary to speculate about problems—and futuristic technology—that may or may not arise in the future. Instead, we reserve judgment and await a proper case with a developed record.” There will most likely be constitutional challenges to the Freedom from Unwarranted Surveillance Act.

AOC points out that SB167 Section 6(A) provides immunity for a person engaging unilaterally in removing an offending drone or unmanned aircraft unless that unilateral action is otherwise prohibited by law. A person may be able to prevent impermissible images and information from being collected by removing the offending drone or aircraft, but Section 6(B) provides a prohibition against the use of impermissibly obtained information in a court of law except to establish a violation of the Act. People who take unilateral action against a drone or aircraft could incur charges or liability where surveillance is warranted or conducted under exigent

circumstances.

Manned aerial observations are generally permitted under the Fourth Amendment. *Florida v. Riley*, 488 U.S. 445 (1989); *California v. Ciraolo*, 476 U.S. 207 (1986). But, if the surveillance leads to more than just observation and actually causes an unreasonable intrusion on the ground, such as wind, dust, or noise, then courts will likely require a warrant. *State v. Davis*, 2015-NMSC-034, 360 P.3d 1161.

## **TECHNICAL ISSUES**

The short title of the bill is “Freedom from *Unwanted* Surveillance Act,” rather than the “Freedom from *Unwarranted* Surveillance Act” set out in SB167.

The New Mexico Attorney General’s Office (AGO) points out the following possible discrepancies:

Section 3. There seems to be a big loophole for law enforcement agencies. While law enforcement agencies are prohibited from gathering “evidence or other information pertaining to criminal conduct” without a warrant in (A), they are *not* prohibited from “conducting surveillance of a person or of property” in (B).

Section 5. While the proposed act allows an aggrieved person to obtain an injunction, the remedies in a civil action are left to the courts. Such a civil action may not be financially feasible for most people, because it is hard to award damages for non-constitutional violations of privacy, and attorney fees can be prohibitive.

Section 5. The exemption from prosecution is equivocal. It does not provide adequate, constitutional notice. While the bill purports to exempt a person from prosecution or liability for unilaterally removing an offending drone, it does not exempt the person when the action is “otherwise prohibited by law.” Thus, it is not clear whether the person would be prosecuted for criminal damage to property or larceny, for example, if the person takes or destroys an offending drone.

According to DPS, as written, the bill would seem to prohibit any evidence gathered by a drone even if employed in a non-criminal matter and in public venues.

## **OTHER SUBSTANTIVE ISSUES**

AGO asserts that law on the use of drones and unmanned aircraft is still developing. The FAA has recently promulgated regulations (14 CFR Part 107) on the use of small unmanned aircrafts, requiring licensure, registration, testing, and providing age and other restrictions on the use and operation of drones, including a maximum altitude of 400 feet above ground and a maximum ground speed of 100 mph. According to the National Association of Attorneys General, 18 states have passed laws prohibiting the use of drones for surveillance without a warrant, and 19 states have passed laws restricting the use of drones for hunting and fishing.

AGO adds that the bill proposes to prohibit drones where manned aircraft are allowed. However, even if the Fourth Amendment would allow some drone surveillance, a State is well within its powers to provide more privacy protections for its citizens than required by the federal

constitution. There may be issues with federal preemption insofar as this bill places prohibitions on federal and tribal law enforcement agencies. But, States have local police and zoning powers and can protect the privacy of their citizens.

## **ALTERNATIVES**

DMA suggests the following change to “**SECTION 4. [NEW MATERIAL] USE OF DRONES OR UNMANNED AIRCRAFT UNDER EXIGENT CIRCUMSTANCES.**”--The Freedom from Unwarranted Surveillance Act does not prohibit the use of a drone by a law enforcement agency, or any state agency acting at the request of a law enforcement agency, when exigent circumstances exist. For the purposes of this section, exigent circumstances exist if a law enforcement agency is engaged in hot pursuit or possesses reasonable suspicion that, under particular circumstances, swift action is necessary to prevent imminent danger to life.”

DMA also proposes inserting language in the bill which would specify state agencies using drones in the course of their duties (mapping, utilities, search and rescue, stopping a terrorist threat, etc.) does not constitute “surveillance” for the purposes of this Act.

IAD suggests exempting tribal law enforcement.

## **POSSIBLE QUESTIONS**

DPS asks:

Who is the “person” who will be liable for violations of the provision of this bill? The individual officer or employee? Or the employee’s agency?

Is the civil action covered by the Tort Claims Act?

ABS/al/sb