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FISCAL IMPACT REPORT

SPONSOR Cervantes ORIGINAL DATE 6/19/2020
 LAST UPDATED 6/22/2020 HB _____

SHORT TITLE Law Enforcement Body Cameras SB 8/aSJC/aSF1#1/aSF1#2

ANALYST Rabin

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY20	FY21	FY22	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	\$0.0	Up to \$19.9	\$0.0	Up to \$19.9	Nonrecurring	DPS Operating Fund (additional body cameras)
Total	See Fiscal Implications				Recurring	Municipal and County Operating Funds (body camera footage storage)
Total	See Fiscal Implications				Nonrecurring	Municipal and County Operating Funds (additional body cameras)

(Parenthesis () Indicate Expenditure Decreases)

Relates to Senate Bill 17, House Bill 5, House Bill 7

SOURCES OF INFORMATION

LFC Files

Responses Received From

Attorney General’s Office (NMAG)
 Public Defender Department (PDD)
 New Mexico Sentencing Commission (NMSC)
 Administrative Office of the District Attorneys (AODA)

No Response Received

Department of Public Safety (DPS)¹

¹ Information on New Mexico State Police’s body cameras and related costs was provided by the department in response to a separate inquiry, but DPS did not respond to requests to provide analysis on this bill.

SUMMARY

Synopsis of SFI#2 Amendment

The Senate floor amendment #2 allows the Law Enforcement Academy Board to reinstate the certifications of police officers who have received a pardon from the governor for the offense for which their certification was revoked.

Synopsis of SFI#1 Amendment

The Senate floor amendment #1 removes a provision that would have required the Law Enforcement Academy Board to revoke the certification of any police officer found to be civilly liable for the use of unlawful physical force or for failure to intervene in the use of unlawful force. The amended bill only requires the removal of an officer's certification.

Synopsis of SJC Amendment

The Senate Judiciary Committee amendment to Senate Bill 8 removes the requirement for law enforcement agencies to establish policies prohibiting the recording of general activity. The amendment also adds that peace officers who fail to comply with the policies and procedures related to the use of body-worn cameras shall be presumed to have acted in bad faith. Finally, the amendment removes the applicability clause that applied the changes to the Tort Claims Act to all cases pending or on appeal on or after May 20, 2020, and removes the bill's emergency clause.

Synopsis of Original Bill

Senate Bill 8 would create a new section of law requiring peace officers employed by certain law enforcement agencies who routinely interact with the public to wear a body-worn camera while on duty. Under the definition of law enforcement agency contained in this bill, this section of law applies to municipal police departments, county sheriffs' offices, the New Mexico State Police, and the Department of Public Safety. Peace officer is defined as "any full-time salaried or certified part-time salaried officer who by virtue of office or public employment is vested by law with the duty to maintain the public peace."

Law enforcement agencies are required to develop policies and procedures governing the use of these cameras, including requiring cameras be activated during calls for service or other law enforcement or investigative encounters between the officer and a member of the public, prohibiting deactivation of cameras until the end of the encounter, prohibiting the recording of general activity, requiring videos be retained by law enforcement agencies for at least 120 days, and establishing disciplinary rules for officers who fail to operate their cameras in accordance with these policies or who manipulate or prematurely erase video recordings. The bill specifies that peace officers who fail to comply with these policies and procedures are liable for the independent tort of negligent spoliation of evidence or the independent tort of intentional spoliation of evidence.

The bill amends the Tort Claims Act to make law enforcement officers liable for "the tort of negligent spoliation of evidence or the independent tort of intentional spoliation of evidence against a law enforcement officer" when caused by officers acting within the scope of their

duties. The changes to the Tort Claims Act apply to all cases pending or on appeal on or after May 20, 2020.

This bill also amends the Law Enforcement Training Act to require the Law Enforcement Academy Board to permanently revoke the certification of any police officer is convicted of, or pleads guilty or nolo contendere to, a crime involving the unlawful use or threatened use of physical force or a crime involving the failure to intervene in the use of unlawful force or is found to be civilly liable for the use of unlawful physical force or for failure to intervene in the use of unlawful force. The bill specifies that the board cannot reinstate the officer's certification or grant the officer a new certification unless the officer is exonerated by a court.

This bill contains an emergency clause and would become effective immediately upon signature by the governor.

FISCAL IMPLICATIONS

This bill would require many law enforcement agencies statewide to purchase body-worn cameras and store the videos from those cameras for at least 120 days.

The primary cost to the state would be for body-worn cameras for New Mexico State Police (NMSP) officers and the storage of the video from those cameras; however, NMSP already has 630 body-worn cameras and is currently implementing an IT system to store the footage from these cameras, so it is unlikely to have significant additional expenditures to comply with the provisions of this bill. At the end of FY20 Q3, NMSP employed 655 officers; it is unclear if the existing body cameras can be shared by multiple officers whose shifts do not overlap or if all 655 officers routinely interact with the public and are subject to the provisions of this bill. If NMSP were required to purchase an additional 25 cameras for the remaining officers (at a cost of \$795 per camera), the total cost would be \$19.9 thousand.

The frequency with which body cameras must be replaced was not known at the time of this analysis, but replacement of body cameras could result in some additional recurring costs, but the majority of these costs should already be included in the Department of Public Safety's (DPS) operating budget.

New Mexico's 96 municipal police departments and 33 county sheriffs' offices, which together employ 3,811 law enforcement officers, could face significant additional costs under the provisions of this bill,² depending on their current supply of body cameras and policies surrounding maintenance of video records. While this information was not available for all relevant law enforcement agencies at the time of this analysis, it was available for some of the state's largest agencies. Albuquerque Police Department (APD), Las Cruces Police Department, and Santa Fe Police Department, which together employ approximately 1,282 officers, already equip all officers with body cameras, while the Bernalillo County Sheriff's Office, which employs about 354 officers, does not currently require body cameras be worn but has funding set aside for this purpose: \$1 million for one-time costs and \$500 thousand recurring. Both the Doña Ana County Sheriff's Office and the Santa Fe County Sheriff's Office, which employ about 205

² Number of municipal police departments, number of county sheriffs' offices, and number of law enforcement officers determined based on FY20 law enforcement protection fund distributions.

officers, appear to use body cameras for at least some of their officers (if not all), although specific policies could not be located.

Based on the costs to NMSP, additional body cameras for law enforcement agencies that do not currently have such cameras would cost \$795 each. Annual costs for video-footage storage is difficult to determine. A report from the stakeholder working group on body-worn cameras created by 2018 House Memorial 104 and Senate Memorial 98 cited the annual cost for maintaining the APD's body cameras and retaining their footage as \$881.6 thousand, a per camera annual cost of less than \$1,000 per camera. NMSP's annual costs for video storage from body cameras are \$3.1 million,³ a per camera annual cost of \$4,920 per camera (for the department's 630 cameras).

The Administrative Office of the District Attorneys (AODA) notes that additional staff may be required to comply with the mandates of this bill and that "risk management will need to be funded adequately to addresses cases that may arise pursuant to the provisions of this bill for civil liability."

SIGNIFICANT ISSUES

Privacy Concerns. Both PDD and the Administrative Office of the Courts (AOC) raise concerns that removing the prohibition on recording "general activity" may present privacy concerns and potentially lead to litigation. PDD states that such concerns may arise "if officers use body cameras to surreptitiously record the public, or record persons in protected spaces or engaging in First Amendment protected activities without authorization for an undercover investigation." PDD adds that "Expanding privacy protections and increasing the tangible remedies for failures to comply with the bill's provisions would increase its effectiveness and better balance the public interests at play."

Applicability. The requirements in this bill for officers to wear body cameras could be interpreted to apply to undercover law enforcement officers, law enforcement officers meeting with informants, law enforcement officers conducting interviews in environments with other recording mechanisms (such as within police station interview rooms), and law enforcement officers interacting with victims who may have privacy concerns when being recorded.

Efficacy of Body-Worn Cameras. The efficacy of body-worn camera requirements at changing police behavior is unclear. According to a March 2019 review of research into the evidence base for body-worn cameras conducted by George Mason University's Center for Evidence-Based Crime Policy examined 70 empirical studies of these cameras, body-worn cameras "have not had statistically significant or consistent effects on most measures of officer and citizen behavior or citizens' views of police." While five studies reviewed found officers wearing cameras use force less than officers not wearing cameras, an additional eight studies showed no statistically significant differences in use of force between officers wearing cameras and those who did not.⁴

³ This cost is solely for the annual maintenance fees for NMSP's IT system for body camera video footage storage (Watchguard), and does not include annual maintenance fees for other IT systems maintained by NMSP or the Department of Public Safety that do not relate to body camera video footage storage.

⁴ Lum, C, Stoltz, M, Koper, CS, Scherer, JA. Research on body-worn cameras: What we know, what we need to know. *Criminology & Public Policy*. 2019; 18: 93– 118. <https://doi.org/10.1111/1745-9133.12412>

Disciplinary Rules. PDD notes that the bill requires law enforcement agencies to “establish disciplinary rules,” language which leaves significant of flexibility as to whether and when to actually impose discipline for policy violations. The agency suggests that stronger language, such as “requiring mandatory discipline” would be more likely to achieve the desired result.

Retention Requirements and Consequences for Destroying or Altering Video Footage. NMAG notes that the retention requirement of at least 120 days may not be sufficient if there is an underlying criminal or civil case involving either the peace officer or the suspect the peace officer encounters, in which case the recording would need to be retained for a longer period of time.

Certification Revocation and Recertification. PDD states that “The Senate Floor amendments reduce the professional consequences for officers who violate the law and departmental policies by allowing them to keep their certification even after a finding of civil liability for the excessive use of force, including the fatal use of excessive force. The amendment allowing reinstatement of certification, even after a criminal finding of the use of excessive force, allows the potential for political calculations to return certification to a properly convicted individual, *notwithstanding* criminal guilt.”

NMAG raises concerns regarding the language of the bill related to revocation of police officer certifications by the Law Enforcement Academy Board. NMAG notes that the phrase “a crime involving the unlawful use or threatened use of physical force or a crime involving the failure to intervene in the use of unlawful force” is potentially ambiguous and could lead to litigation and appeals of the board’s revocation decisions. NMAG suggests identifying the particular crimes for which this revocation would be required to resolve the ambiguity.

NMAG also notes that the board may recertify a police officer who is “exonerated,” by a court, but the definition of “exonerated” is unclear in this context when it applies to persons who have already been found liable. NMAG states that exoneration generally means absolving an individual of blame or liability, and suggests that if the intention is to mean a conviction has been overturned by a higher court, it might be useful to specify that.

Law Enforcement Agencies Impacted. The requirements for peace officers to wear body cameras and for the agencies that employ them to develop policies related to their use and retain their footage apply only to municipal police departments, county sheriffs’ offices, the New Mexico State Police, and the Department of Public Safety. This excludes other state agencies that employ law enforcement officers who are sometimes defined as peace officers (such as the Corrections Department’s correctional officers and probation and parole officers), tribal police departments, and university police departments. It would not apply to investigators employed by district attorneys’ offices, although AODA notes those investigators are certified peace officers, are defined in as law enforcement officers in the Extreme Risk Firearms Protection Act, and sometimes take statements from suspects, victims, and witnesses.

PERFORMANCE IMPLICATIONS

PDD notes that the ability to make use of the policies in this bill in criminal cases against recorded persons is crucial to the ability to present a defense comporting with due process.

ADMINISTRATIVE IMPLICATIONS

NMAG provides legal representation to the Law Enforcement Academy Board for all disciplinary matters and related litigation, and employs law enforcement officers who would be subject to some of this bill's requirements. As a result, NMAG states that this bill would require greater resources from it and could impact the agency's other performance-based targets.

RELATIONSHIP

This bill relates to House Bill 7 and Senate Bill 17, which establish reporting and prosecution requirements for peace officer uses of force that result in great bodily harm or death. Those bills also specify that the attorney general has concurrent jurisdiction to prosecute unlawful uses of force resulting in great bodily harm or death and to prosecute any unlawful use of force involved in a failure to comply with the requirements for electronic recordings of custodial interrogations (pursuant to Section 29-1-16 NMSA 1978) or a failure to record the incident by using a body-worn camera approved by DPS. Senate Bill 8 does not require DPS to approve body-worn cameras used by other law enforcement agencies.

OTHER SUBSTANTIVE ISSUES

Police Violence in New Mexico. New Mexico has the highest per capita rate of people killed by police in the country over the past five years, according to two national databases. From 2015 to 2019, between 101 and 107 individuals were killed by police, a rate of 9.7 to 10.2 per million residents, while the national rate of individuals killed by police ranged from 3 to 3.4 per million residents. Comparatively, New York, with over nine times New Mexico's population, saw roughly the same number of people killed by police during this period (between 90 and 108 individuals, a rate of 0.9 to 1.1 per million residents).⁵

Similar Legislation in Other States. AOC notes that the National Conference of State Legislatures reported 34 states and the District of Columbia had created laws for body cameras as of March 2018. On June 16, 2020, new legislation was signed requiring all New York State Police officers to wear body cameras, and on June 19, 2020, Colorado's governor signed a sweeping police accountability bill, SB 217, requiring every law enforcement officer in Colorado to wear body cameras.

Additional Agency Analysis. NMAG provides the following additional analysis of bill as amended by the Senate Judiciary Committee and on the Senate Floor:

The proposed legislation should consider the recommendations of the stakeholder working group on body-worn cameras created by 2018 House Memorial 104 and Senate Memorial 98, particularly as they concern the privacy of children and people experiencing mental health episodes.

Section 29-1-16 ("Electronic recordings of custodial interrogations"), enacted in 2005, mandates that police record custodial interrogations of citizens suspected of committing

⁵ Data on police killings sourced from the *Washington Post's* Fatal Force project, which only includes fatal police shootings, and Mapping Police Violence (mappingpoliceviolence.org), which includes all police killings regardless of the cause of death. Population data to calculate rates of police killings sourced from the U.S. Census Bureau.

felony offenses "when reasonably able to do so". This law would partially overlap with Senate Bill 8, since Section 29-1-16 already requires police to record (albeit not always by audio-visual means) custodial interrogations conducted at felony crime scenes unless good cause exists for not doing so.

NMAG also adds the following:

The Law Enforcement Academy Board may take action to discipline or revoke a licensee in accordance with the Board's statute and rules, after due process and an administrative hearing. The amendments remove any additional requirements or standards that the Board must rely upon.

PDD states:

The real potential for liability is critical to deterring officer misconduct. Without a doubt, peace officers often need to use some sort of force to reasonably discharge their duties, so they should not be prosecuted for battery or false imprisonment every time they arrest someone. Nevertheless, when questions arise about the reasonableness of an officer's behavior, video evidence can be critical for criminal defendants to challenge their charges and for civil plaintiffs injured by an officer to establish their claims.

PDD also notes: "The removal of retroactivity and the emergency clause also reduce the reach of the policy changes" and "The presumption of bad faith for failure to record strengthens the incentive to comply with the law."

Attachments:

1. House Memorial 104 and Senate Memorial 98 Stakeholders' Summary Report

ER/rl