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## FISCAL IMPACT REPORT

SPONSOR SJC ORIGINAL DATE 01/23/21  
LAST UPDATED 03/02/21 HB \_\_\_\_\_  
SHORT TITLE State Agency Disclosure of Sensitive Info SB 75/SJCS/aSF1#1  
ANALYST Gaussoin/Courtney

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

	FY21	FY22	FY23	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>		See Fiscal Implications				

(Parenthesis ( ) Indicate Expenditure Decreases)

Similar to House Judiciary Committee Substitute for House Bill 124 and Senate Bill 327.

### **SOURCES OF INFORMATION**

LFC Files

#### Responses Received From

New Mexico Attorney General (NMAG)  
Department of Health (DOH)  
State Personnel Office (SPO) original bill  
State Ethics Commission (SEC)  
Office of Superintendent of Insurance (OSI) original bill

### **SUMMARY**

#### Synopsis of SF1#1 Amendment

The Senate Floor #1 amendment to the Senate Judiciary Committee Substitute for Senate Bill 75 adds a statutory reference to the Nondisclosure of Sensitive Personal Information Act in the jurisdiction provisions of the State Ethics Commission. The amendment also makes a change to a citation to the State Ethics Commission Act.

#### Synopsis of Original Bill

Senate Judiciary Committee substitute for Senate Bill 75 prohibits disclosure of sensitive personal information by state employees prescribing penalties and providing exceptions for disclosure by amending statutes impacting public officers and employees.

The bill enacts the Nondisclosure of Sensitive Personal Information Act.

The bill would allow for the release of the information under nine exceptions, including when necessary to carry out the function of a state agency, to comply with a court order or subpoena, when required by federal statute or the Inspection of Public Records Act (IPRA), when required by federal statute, made to or by a court in the course of a judicial proceeding, made to a state contractor to perform contract obligations, made pursuant to the Whistleblower Protection Act, when permitted by the federal Health Insurance Portability and Accountability Act of 1996, or made with written consent of the person whose information would be disclosed.

The bill defines sensitive personal information as identifying a status of a recipient of public assistance or as a crime victim, sexual orientation, gender identity, physical or mental disability, medical condition, immigration status, national origin or religion along with information including the social security number or tax identification number of an individual.

The bill defines penalties for violations of the act including dismissal, demotion, or suspension. It further empowers the attorney general, a district attorney and the state ethics commission to institute civil action which could result in a temporary injunction, a restraining order or civil penalties of \$250 dollars per violation not to exceed \$5,000 dollars.

The law would become effective July 1, 2021.

## **FISCAL IMPLICATIONS**

The bill could result in additional workload for agencies enforcing provisions of the act. The bill could also result in a need for additional training on the act, particularly for those state employees handling sensitive data on a regular basis. The bill does not include an appropriation.

## **SIGNIFICANT ISSUES**

**Potential issues with duplication with existing law.** Numerous existing state laws (NMSA 7-1-8; NMSA 10-16-3(A); NMSA 10-16-6; NMSA 14-3A; NMSA 43-1-19) and federal laws (Health Insurance Portability and Accountability Act (HIPPA), the Americans with Disability Act, and the Family Educational Rights and Privacy Act) provide protections to certain categories of data deemed confidential by law. Some of the proposed data protections proposed in Senate Judiciary Committee substitute for Senate Bill 75, for data categorized by the bill as sensitive, reflect protections already in place in existing state and federal statute (for example social security numbers are deemed confidential by the United States Social Security Act). Along these lines, in their analysis on the original bill SPO indicates that the Americans With Disabilities Act already requires employers to keep any medical information learned about applicants or employees confidential.

**Potential issues with Inspection of Public Records Act.** The office of Attorney General (NMAG) indicates the provision in the bill permitting disclosure of sensitive personal information when required by IPRA would create ambiguity because IPRA *requires* disclosure except as otherwise required by law. “Read literally this exception would effectively negate the overall confidentiality conferred by the bill in the context of a request for records pursuant to IPRA” the agency says.

Similarly, the bill permits the disclosure of information when “necessary to carry out a function of the state agency” and IPRA provides that providing public records is a function of all public

bodies, creating real ambiguity on the responsibilities of state agencies. From NMAG: “Because violations of the Governmental Conduct Act are criminal offenses, state agencies would potentially face a dilemma of either running the risk of a criminal penalty for violating the Governmental Conduct Act or facing a civil penalty for violating IPRA.”

**Potential issues created for data sharing among agencies.** DOH indicates there are state and federal laws that permit routine disclosures of information that fall within the definition of “sensitive personal information.” DOH states “By allowing only disclosures “required by federal statute”, rather than disclosures required or permitted by state or federal laws, the bill could have the effect of prohibiting state agencies from disclosing information that those agencies may need to disclose in order to accomplish their work.” Along these lines, although the committee substitute lists an exception of disclosing data as allowed by HIPPA under exceptions, and notes disclosure as required by federal statute as a exceptions, there are other federal laws that allow for disclosure of personally identifiable information that are not addressed in the bill. For example, the Federal Educational Rights and Privacy Act (FERPA) includes exceptions that allow protected data to be shared under certain conditions with agencies, vendors or individuals, or to conduct studies, audit or evaluate programs, or in the case of responding to health or safety emergencies. Since these are allowances under FERPA and not requirements, it is unclear if the provisions of Senate Judiciary Committee substitute for Senate Bill 75 could limit the sharing of “sensitive personal information” unless it meets another exception of the act (e.g. a state agency determines the sharing of such data is necessary to carry out a function of the state agency). Although it is unlikely data should be shared if not determined to be necessary to carry out a function of a state agency, data sharing among agencies would likely be based on that interpretation. Note that previous LFC staff reports have cited existing difficulties in data-sharing among state and local agencies noting agencies are sometimes reluctant to share data with one another citing concerns with standing state and federal law. DOH states “If state agencies can’t make those permissive disclosures, it could have a significant detrimental impact on their work.”

The State Ethics Commission points out that it is unclear whether SB75 could limit or significantly constrain the sharing of “sensitive personal information” between state agencies where agencies have entered data sharing agreements.

In their analysis on the original bill, the Office of Superintendent of Insurance indicate that SB75 and related legislation (HB124) would dampen or end efforts to eliminate data silos across state agencies by hampering potential for development of integrated data systems “perpetuating inefficiencies where multiple agencies keep the same and related data in their own systems which can’t interact.”

### **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

The State Ethics Commission points out that existing state statute already prohibits some of the conduct that SB75/SJCS targets stating “Sections 10-16-3(A) and 10-16-6 NMSA 1978 already prohibit some conduct that SB75 targets: for example, Section 10-16-3(A) NMSA 1978 already prohibits a state employee from selling an individual’s sensitive personal information that the state employee acquired through their position of state employment. Section 10-16-3(A) NMSA 1978 also would prohibit a state employee from disclosing an individual’s sensitive personal information to further a private purpose, including a purpose not required by law or connected to the state agency’s mission.”

Similar to House Judiciary Committee substitute for House Bill 124 but differing in organization and penalties. Similar to Senate Bill 327 although SB327 differs slightly in exceptions, includes a change to motor vehicle statute and does not include a section for penalties.

## TECHNICAL ISSUES

Office of the Attorney General indicates the definition of a social security number as inclusive of a taxpayer identification number is potentially confusing stating “The original bill simply stated that sensitive personal information included both a “social security number” and a “taxpayer identification number.” For clarity, the committee substitute’s definitions section might be better reverted to the original in this respect.”

## OTHER SUBSTANTIVE ISSUES

The State Ethics Commission points out that they have promulgated rules that include a similar non-disclosure provision in the commission’s model code of ethics for state agencies although it is up to state agencies to adopt the provisions of the model code.

The NMAG points out that the provisions of Section 1 would only apply to employees of state agencies (not local government agency employees). NMAG also states there could be ambiguity in the phrase “crime victim” and to avoid ambiguity the bill could incorporate by reference the definitions of the Victims of Cram Act.

## AMENDMENTS

The NMAG recommends amending proposed subsection (A)(3) to read: “pursuant to a request for public records under the Inspection of Public Records Act” to make clear that sensitive personal information can be produced under IPRA.

The NMAG further proposes that to avoid any ambiguity in the definition of crime victim, the Bill could incorporate by reference the definitions of the Victims of Crime Act, NMSA 1978, Sections 31-26-1 to -15 (1994, as amended through 2019). The wording on page 2, lines 20-21 could be:

(1) status as a recipient of public assistance or as a crime victim, as defined by the Victims of Crime Act;

DOH recommends suggests that to resolve the potential disruption to state agency disclosures that are routinely made as permitted (but not required) by federal and state laws, the exception for disclosures “required by federal statute” that is contained in Section 3 of the SJC substitute, be revised to duplicate the exception identified in SB327, a companion bill to SB75, for disclosures that are “required or permitted by state or federal law”.